No. 126, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

KANSAS' BRIEF IN OPPOSITION TO NEBRASKA'S MOTION TO DISMISS

CARLA J. STOVALL
Attorney General of Kansas
JOHN W. CAMPBELL
Chief Deputy Attorney General
DONALD L. PITTS
Assistant Attorney General
LELAND E. ROLFS
AMY L. AUFDEMBERGE
Special Assistant Attorneys General

JOHN B. DRAPER
Counsel of Record
Special Assistant Attorney General
ANDREW S. MONTGOMERY
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

September 10, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ... iii

Statement ... 1

1. This Case ... 1

2. The Republican River Basin ... 1

3. The Republican River Compact ... 3

Summary of Argument ... 5

Argument ... 9

I. The Plain Language of the Republican River Compact Restricts a State's Consumption of Groundwater to the Extent Necessary to Maintain Allocations of Surface Flows to Downstream States ... 9

II. The Records of the Negotiations and Approval of the Republican River Compact Show that the Compact was Intended to Restrict a State's Consumption of Groundwater to the Extent Necessary to Maintain Allocations of Surface Flows to Downstream States ... 11

III. Nebraska's Arguments that the Compact Does Not Restrict Consumption of Groundwater Are Without Merit ... 22

A. Nebraska Misstates the Kansas Claim ... 22

B. The Term "Virgin Water Supply" Includes Both Surface Water and Tributary Groundwater ... 23

TABLE OF CONTENTS – Continued

Page

C. The *Sporhase* Decision and the Brief Endorsed by Kansas in that Case are Consistent with Kansas' Position that the Compact Restricts Consumption of Groundwater 27

D. The States Have Traditionally Administered the Compact on the Basis that Groundwater Consumption Is Restricted by the Compact 28

E. Only this Court Can Authoritatively Interpret the Compact as Between the States .. 33

F. Nebraska's Position is Inconsistent with Its Position in *Nebraska v. Wyoming*, No. 108, Original 34

Conclusion 36

Appendices ..... ia

TABLE OF AUTHORITIES

Page

CASES

City of Albuquerque v. Reynolds, 72 N.M. 428, 379 P.2d 73 (1962) 26

Kansas v. Colorado, 475 U.S. 1079 (1986) 26

Kansas v. Colorado, 514 U.S. 673 (1995) 24, 27

Kansas v. Colorado, No. 105, Original 6, 26

Kansas v. Nebraska, 119 S. Ct. 865 (1999) 1

Kansas v. Nebraska, 119 S. Ct. 2364 (1999) 1

Mississippi v. Louisiana, 506 U.S. 73 (1992) 34

Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) 35

Nebraska v. Wyoming, No. 108, Original 8, 34

Nebraska v. Wyoming, 515 U.S. 1 (1995) 34

Oklahoma v. New Mexico, 501 U.S. 221 (1991) 11

Pioneer Irrigation Dist. v. Colorado, 658 P.2d 842 (Colo. 1983) 32, 33

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 7, 27, 28

State ex rel. Douglas v. Sporhase, 208 Neb. 703, 305 N.W. 2d 614 (1981) 31

State ex rel. Emery v. Knapp, 167 Kan. 546, 207 P.2d 440 (1949) 32

State ex rel. Peterson v. Kansas State Bd. of Agric., 158 Kan. 603, 149 P.2d 604 (1944) 31, 32

Texas v. New Mexico, No. 65, Original 6, 25, 26

TABLE OF AUTHORITIES – Continued

Page

Texas v. New Mexico, 421 U.S. 927 (1975) 25

Texas v. New Mexico, 462 U.S. 554 (1983) 25, 26

Texas v. New Mexico, 482 U.S. 124 (1987) ... .24, 27

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) ... 33

CONSTITUTIONAL PROVISION

U.S. Const. art. III, § 2 34

STATUTES AND OTHER AUTHORITIES

Arkansas River Compact..... ... . .24, 26

Pecos River Compact 24, 25, 26

Republican River Compact..... .... *passim*

28 U.S.C. § 1251(a) 34

Act of August 4, 1942, ch. 545, 56 Stat. 736 4

H. R. 5945, 77th Cong., 1st Sess. (1941) 3, 20

S. 1361, 77th Cong., 1st Sess. (1941).... 3

H. R. Doc. No. 690, 77th Cong., 2d Sess. (1942) .. 4

S. 649, 78th Cong., 1st Sess. (1943)..... ..20

80 Cong. Rec. 8485-86 (June 1, 1936)..... 12

86 Cong. Rec. App. 58 (Jan. 4, 1940) 12

1943 Kan. Laws 612, codified at Kan. Stat. Ann. § 82a-518 (1997) 4

TABLE OF AUTHORITIES – Continued

Page

1943 Neb. Laws 377, codified at 2a Neb. Rev. Stat., App. 1-106 (1995) 4

1943 Colo. Laws 362, codified at Colo. Rev. Stat. §§ 37-67-101, 102 (1990) 4

1965 Colo. Laws, ch. 318, § 1 26

Republican River Compact Administration, 1st Annual Report (1961) 28

Republican River Compact Administration, 30th Annual Report (1990) 31

Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact, *Texas v. New Mexico*, No. 65, Orig. (Sept. 7, 1979) 25

Special Master Third Interim Report, *Nebraska v. Wyoming*, No. 108, Original (Sept. 9, 1994) 34

1 Bureau of Reclamation, U.S. Dep't of Interior, Definite Plan Report, Bostwick Division (1953) 13

Bureau of Reclamation, U.S. Dep't of Interior, Special Report: Republican River Basin Management Study (1985) 3

Bureau of Reclamation, U.S. Dep't of Interior, Resource Management Assessment, Republican River Basin (1996) 3, 13

Edwin D. Gutentag et al., Geohydrology of the High Plains Aquifer in Part of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas and Wyoming (USGS Professional Paper 1400-B) (1984) 2

TABLE OF AUTHORITIES – Continued

Page

Richard R. Lucky et al., Digital Simulation of Ground-Water Flow in the High Plains Aquifer in Part of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas, and Wyoming (USGS Professional Paper 1400-D) (1986) 2

Jon M. Peckenpaugh et al., Simulated Response of a High Plains Aquifer to Ground-Water Withdrawals in the Upper Republican Natural Resources District, Nebraska (USGS Water-Resources Investigations Report 95-4014) (1995) 2

KANSAS' BRIEF IN OPPOSITION TO NEBRASKA'S MOTION TO DISMISS

STATEMENT

1. This Case

The Court granted Kansas' Motion for Leave to File Bill of Complaint on January 20, 1999. 119 S. Ct. 865. The Bill of Complaint generally alleges that Nebraska has violated the Republican River Compact by allowing consumption in Nebraska of water, including groundwater, in excess of Nebraska's allocation under the Compact. See Kansas Bill of Complaint ¶¶ 7-11.

The Court granted Nebraska leave to file a motion to dismiss the Kansas Bill of Complaint on June 21, 1999. 119 S. Ct. 2364. The Court limited the question to be addressed to "whether the Republican River Compact restricts a State's consumption of groundwater." Nebraska filed its Motion to Dismiss (Motion) and Brief in Support (Nebraska Brief) on August 2, 1999.

As Nebraska points out, the allegations of the Kansas Bill of Complaint are deemed admitted for purposes of the Motion. Nebraska Brief 4-5. The allegation of principal importance for purposes of the Motion is that groundwater pumping and consumption in Nebraska are depleting the waters of the Republican River and its tributaries that would otherwise flow to Kansas.

2. The Republican River Basin

The Republican River Basin ("Basin") has been described generally in Kansas' Brief in Support of Motion

for Leave to File Bill of Complaint 2-5. The Basin has been the subject of a number of studies by the United States Geological Survey ("USGS") and other federal agencies. These reports describe the hydraulic connection between the groundwater aquifers and the surface flows of the Basin. In its analysis of the High Plains aquifer (also known as the Ogallala aquifer), which is prevalent in the Basin, the USGS has pointed out that "[t]he base flow of a river represents the ground-water contribution to the river." Richard R. Lucky et al., Digital Simulation of Ground-Water Flow in the High Plains Aquifer in Part of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas, and Wyoming 38 (USGS Professional Paper 1400-D) (1986); see also Edwin D. Gutentag et al., Geohydrology of the High Plains Aquifer in Part of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas and Wyoming 28 (USGS Professional Paper 1400-B) (1984).

The USGS has stated that increased utilization of groundwater from the Ogallala/High Plains aquifer in the upper part of the Basin has had a "substantial effect on water levels in the aquifer and on rates of groundwater seepage from the aquifer into area streams." Jon M. Peckenpaugh et al., Simulated Response of a High Plains Aquifer to Ground-Water Withdrawals in the Upper Republican Natural Resources District, Nebraska 14 (USGS Water-Resources Investigations Report 95-4014) (1995). The USGS has also shown that groundwater pumping in Nebraska has the potential to reduce substantially, even eliminate, the base flow of the Republican River and its tributaries. See *id.*, at 50-59.

The U.S. Bureau of Reclamation has noted the effect of groundwater pumping on stream flows in the Republican Basin, pointing out that wells pumping near a stream can either reverse the flow from the aquifer to the stream or decrease the aquifer's discharge to the stream. Bureau of Reclamation, U.S. Dep't of Interior, Special Report: Republican River Basin Management Study 41-43 (1985). In a more recent study, the Bureau of Reclamation stated:

> "[S]ince the late 1960's, the area's overall water supply has decreased, in part because groundwater development in the Republican River Basin has increased. The drilling of wells and the use of groundwater has had an adverse effect on the available flow in the rivers above the reservoirs. Because of this development, inflows to Reclamation reservoirs have steadily decreased " Bureau of Reclamation, U.S. Dep't of Interior, Resource Management Assessment, Republican River Basin 14 (1996).

3. The Republican River Compact

The Republican River Compact was negotiated in two phases. The first phase of negotiations occurred in 1940 and 1941, resulting in an agreement among the States of Colorado, Nebraska and Kansas on March 19, 1941. See S. 1361, H. R. 5945, 77th Cong., 1st Sess. (1941). After consideration and approval by Congress, however, the bill granting the consent of Congress was vetoed by President Franklin D. Roosevelt on April 2, 1942. Message From the President of the United States Returning Without Approval the Bill (H. R. 5945) Granting the Consent of Congress to Compact Entered Into by the States of Colorado, Kansas, and Nebraska With Respect to the Use

of the Waters of the Republican River Basin. H. R. Doc. No. 690, 77th Cong., 2d Sess., Misc., vol. 1, p. 1 (1942), attached hereto as Appendix J. Although President Franklin D. Roosevelt approved of the purpose of apportioning the waters of the Republican River Basin by compact, the President was concerned that the proposed compact sought to withdraw federal jurisdiction over navigation and to restrict federal authority over water projects. *Ibid.* Congress thereafter passed, and the President signed, an act authorizing further negotiations and appointing a federal representative to participate in those negotiations. Act of August 4, 1942, ch. 545, 56 Stat. 736. The three States agreed to the Republican River Compact in its final form on December 31, 1942. The apportionment of the waters of the Republican River Basin among the States did not change from the apportionment approved by Congress in 1941. Changes were made, however, to address the concerns expressed by the President. The legislatures of each of the three States approved the Compact as modified (Kansas: Act of February 22, 1943, 1943 Kan. Laws 612, codified at Kan. Stat. Ann. § 82a-518 (1997); Nebraska: Act of February 24, 1943, 1943 Neb. Laws 377, codified at 2a Neb. Rev. Stat., App. 1-106 (1995); Colorado: Act of March 15, 1943, 1943 Colo. Laws 362, codified at Colo. Rev. Stat. §§ 37-67-101, -102 (1990)). Congress then passed an act consenting to the Compact, which the President approved on May 26, 1943. 57 Stat. 86.

The Republican River Compact is appended to the Bill of Complaint in this case. Article I declares the major purposes of the Compact, including the equitable division of the waters of the Republican River Basin. Article

II provides definitions of certain central terms. "Virgin Water Supply" is defined to be "the water supply within the Basin undepleted by the activities of man." The term "Beneficial Consumptive Use" is defined to be "that use by which the water supply of the Basin is consumed through the activities of man." Article III sets out the computed average annual Virgin Water Supply for each of the sub-basins. Article III also provides for adjustment of the allocations if the future computed Virgin Water Supply varies more than 10% from that stated in Article III. Article IV provides the specific quantifications comprising the allocation to each of the three States. These are specified in amounts of beneficial consumptive use allowed in each sub-basin in each State, except that a delivery right is specified for Kansas at Guide Rock, Nebraska. Articles V-VIII treat matters of less importance to the current controversy. Article IX provides for joint administration of the Compact by the water officials of each State, who "may, by unanimous action, adopt rules and regulations consistent with the provisions of this Compact." Articles X and XI treat the relationship between the States and the Federal Government.

SUMMARY OF ARGUMENT

The Republican River Compact equitably divides the waters of the Republican River Basin among the three compacting States, Colorado, Nebraska and Kansas. Groundwater pumping from both the alluvial and the Ogallala aquifers in Nebraska is presently depleting the surface flows of the Republican River upon which Kansas depends and which are allocated to Kansas under the

Compact. The question whether the Compact restricts consumption of groundwater quickly reduces to whether the compacting parties intended to allow consumption of groundwater to change the Compact allocations among the States. The language of the Compact contains no such exception to the allocations. Further, the Compact apportions the entire virgin flow of the Republican River among the States, including the portion of that flow that is discharged to the river from the groundwater system. Therefore, Kansas understands the plain meaning of the Compact to allow no use of water in the Republican River Basin that would change the Compact allocations to the States.

Kansas' reading of the Republican River Compact is consistent with the Court's interpretation of the Pecos River Compact in *Texas v. New Mexico*, No. 65, Original, and with its interpretation of the Arkansas River Compact in *Kansas v. Colorado*, No. 105, Original.

In addition to the plain meaning of the Republican River Compact, the records of the negotiations and approval of the Compact show that the compacting parties intended to include groundwater consumption in the beneficial consumptive use allocations to the States in the Compact. The minutes of the Compact negotiations and associated official correspondence of the negotiating Compact Commissioners from each State, together with official statements of the federal officials advising Congress on approval of the Compact, show an unmistakable intention to include groundwater in the Compact allocations.

The arguments that Nebraska puts forward are without merit. The fact that the term "groundwater" is not mentioned in the Compact is of no significance. Nebraska fails to point out that the term "surface water" also does not appear in the Compact. Rather, the Compact negotiators chose the term "Virgin Water Supply" in order to encompass all of the waters affected by the apportionment in the Compact. Nebraska's assertion that the parties previously understood the Compact as not restricting the use of groundwater is contradicted by the very first actions of the States after the initiation of formal Compact administration. For instance, beginning with the First Annual Report of the Republican River Compact Administration, the States have demonstrated their understanding that groundwater consumption, of both alluvial and Ogallala groundwater, was included in the Compact allocations. This understanding is made clear by the Formulas for the Computation of Annual Virgin Water Supply adopted by the Compact Administration and published in the First Annual Report. The provisions on the inclusion of groundwater are still in effect today. It is only recently, since about 1990, that Nebraska has taken the inconsistent position that groundwater consumption is not restricted by the Compact.

Nebraska again misses the mark in arguing that the Court's decision and the amicus brief endorsed by Kansas in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), are somehow inconsistent with Kansas' position that the Republican River Compact restricts consumption of groundwater. Kansas does not assert that the Republican River Compact allocates the groundwater of the Ogallala

Aquifer among the compacting States. Nebraska misapprehends Kansas' claim as being a claim to "Nebraska's groundwater" in the Ogallala aquifer. Kansas is not seeking an equitable apportionment of the Ogallala aquifer. To the contrary, Kansas claims only its equitable portion of the surface flows of the Republican River as determined by the Compact. The Compact prohibits a State from interfering or allowing its citizens to interfere, by any means, including groundwater consumption, with the surface flows apportioned to another State. Thus, allocations of the Virgin Water Supply to Kansas cannot lawfully be diminished under the Compact by groundwater pumping in Nebraska; nor can Nebraska's consumption of water from any source in the basin, including groundwater, lawfully exceed Nebraska's portion of the Virgin Water Supply.

Nebraska's assertions with regard to decisions in courts of the compacting States that make passing references to the Republican River Compact are inapposite. In fact, none of those decisions addressed the question whether the Republican River Compact restricts groundwater consumption. In any event, this Court is the only court in the Nation authorized to interpret the Compact authoritatively as between the States.

Finally, Nebraska is currently asserting in *Nebraska v. Wyoming*, No. 108, Original, that the North Platte Decree restricts Wyoming's groundwater use. There, the Court allocated surface waters of the so-called "critical reach" of the North Platte, with no explicit reference to groundwater pumping or consumptive use. Yet Nebraska is claiming that the Decree implicitly requires Wyoming not to deplete flows beyond Wyoming's allocation in the

critical reach by groundwater pumping. Likewise, Kansas is claiming that the Compact in this case requires Nebraska not to deplete flows beyond Nebraska's allocation by groundwater pumping.

ARGUMENT

I. The Plain Language of the Republican River Compact Restricts a State's Consumption of Groundwater to the Extent Necessary to Maintain Allocations of Surface Flows to Downstream States.

A major purpose, indeed the core purpose, of the Compact is to provide an equitable division of the waters of the Republican River Basin. Art. I, ¶ 1. To deprive a State of some or all of its Compact allocation is inconsistent with that purpose. Thus, consumption of groundwater that deprives a downstream State of its allocation must be either limited or offset to avoid the diminishment of the Compact allocation to the downstream State.

Article II of the Compact defines "Virgin Water Supply" as "the water supply within the Basin undepleted by the activities of man." Clearly, pumping and consumption of groundwater are "activities of man." Moreover, pumping and consumption of groundwater are "activities of man" that have great potential to deplete the water supply within the Basin. These central terms of the Compact reflect the intent of the compacting parties that no State should deplete the water supply of the basin by the activities of man except to the extent of that State's allocation.

The Compact allocates all of the Virgin Water Supply among the three States: the total Virgin Water Supply is quantified in Article III as 478,900 acre-feet, which is equal to the sum of the allocations to the three States in Article IV (54,100 acre-feet to Colorado, 190,300 acre-feet to Kansas, and 234,500 acre-feet to Nebraska). Thus, all activities of man that deplete the Virgin Water Supply must be included in the allocation of the State in which they occur. For the purposes of this Motion, it is admitted that groundwater consumption in Nebraska is depleting the surface flows of the Republican River. These depletions must therefore be included in Nebraska's Compact allocation.

Since 100 percent of the Virgin Water Supply is allocated among the States, excessive use by an upstream State, if not offset, will unavoidably deprive a downstream State of its allocated share. Nebraska therefore has a duty under the Compact not to exceed its allocation and thereby to deprive Kansas of its allocation.

For instance, Kansas is entitled to a surface water supply for beneficial consumptive use at Guide Rock, Nebraska of 138,000 acre-feet, as adjusted:

> "There is hereby allocated for beneficial consumptive use in Kansas, annually, a total of one hundred ninety thousand, three hundred (190,300) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified :
>
> * * *
>
> From the main stem of the Republican River upstream from the lowest crossing of the river at the Nebraska-Kansas state line and from water

> supplies from upstream basins otherwise unallocated herein, 138,000 acre-feet; provided, that Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska " Art. IV, ¶¶ 3-4.

It would offend the core purpose of the compacting parties to deprive Kansas of some or all of its Guide Rock allocation of surface flows by pumping and consumption of groundwater for irrigation in Nebraska which, when added to the consumption of surface water in Nebraska, causes Nebraska to exceed its allocation. In other words, the Compact expressly limits beneficial consumptive use in each State and provides expressly for delivery of water to Kansas. It was the intention of the compacting States and Congress that those requirements be met. Nebraska's argument to the contrary should be rejected.

II. The Records of the Negotiations and Approval of the Republican River Compact Show that the Compact was Intended to Restrict a State's Consumption of Groundwater to the Extent Necessary to Maintain Allocations of Surface Flows to Downstream States.

Kansas believes that the Compact means what it says and that there is no ambiguity regarding whether certain beneficial consumptive uses of water in the Basin (i.e., uses of groundwater) are exempted from the requirements agreed to in the Compact. If it were determined, however, that the Compact is ambiguous, resort to the records of the negotiations and approval of the Compact would be appropriate. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n. 5 (1991); see *id.*, at 248-250 (Rehnquist, C.J.,

dissenting). But even if the records of the negotiations and approval of the Compact are consulted, they simply confirm that groundwater consumptive use was meant to be accounted for in the Compact allocations.

The Republican River Basin suffered devastating floods in 1935 and 1936, which led to a number of pleas for federal help with regard to water projects. See, *e.g.*, 80 Cong. Rec. 8485-86 (June 1, 1936) (statement of Sen. Norris); 86 Cong. Rec. App. 58 (Jan. 4, 1940) (statement of Rep. Curtis). Federal officials were amenable to providing federal assistance to the States, but they insisted that the States first agree by compact to a binding equitable apportionment of the waters of the Republican River Basin. This became the driving force behind the negotiation of a compact. For instance, in early 1940, Nebraska Governor R. L. Cochran wrote to E. Porter Ahrens, the President of the Kansas Republican Valley Irrigation and Flood Control Association, with regard to the effort to negotiate a compact:

> "Mr. Page, Commissioner of Reclamation, stated at the Denver meeting of the Reclamation Association that a compact between states was absolutely essential as a condition precedent to any project approval on the part of the Reclamation Service." R.L. Cochran Letter to E. Porter Ahrens, January 11, 1940, attached hereto as Appendix A.[1]

---

[1] For reference, letters and memoranda relied upon in this Brief are transcribed in the Appendices. Copies of the original documents and an authenticating affidavit will be lodged with the Supreme Court Clerk and delivered to the parties.

And once the compact was negotiated, the Bureau of Reclamation relied upon the consumptive use allocations in the Compact to protect inflows to the planned projects.[2]

During their negotiations, the Compact Commissioners representing each of the States received information from the Federal Government with respect to groundwater use planned for the Republican River Basin. And the Commissioners assured the federal planners that such groundwater use was within the basin water supply that they were intending to allocate by compact. Specifically, in the fourth meeting of the Republican River Compact Commission at Topeka, Kansas on January 27-28, 1941, representatives of the U.S. Bureau of Agricultural Economics ("BAE"), including Harry P. Burleigh, "appeared before the Commission and outlined the scope of the

---

[2] In planning for the Bostwick Project, which relies on the inflows to Harlan County Reservoir, the Bureau of Reclamation's Definite Plan Report stated, "The number of acres that can be irrigated has been determined from the water supply remaining after making allowances for complete use of Republican River Compact allocations in upstream states." 1 Bureau of Reclamation, U.S. Dep't of Interior, Definite Plan Report, Bostwick Division 56 (1953). The Bureau of Reclamation's projected depleted annual inflow to Harlan County Reservoir from the Definite Plan Report can be compared to the actual inflows. The total net shortfall in inflows to Harlan County Reservoir for the water years 1961-1994 amounts to well over four million acre-feet. *See id.*, Part 3, App. II; Bureau of Reclamation, U.S. Dep't of Interior, Resource Management Assessment, Republican River Basin 29 (1996). This shortfall is shown graphically in the fold-out Appendix A to Kansas' Reply to Nebraska's Brief in Opposition and to Nebraska's Request for Oral Argument (filed August 1998).

work which the Bureau has been carrying on thruout [sic] the Republican River basin to determine the extent and useability of the underground waters of the basin." Minutes of the Fourth Meeting of the Republican River Compact Commission at Topeka, Kansas on January 27-28, 1941, attached hereto as Appendix B. After discussing the particulars relating to the groundwater report that the BAE was then preparing, the Minutes of the Fourth Meeting state as follows:

> "Mr. Burleigh presented the Commission with a tabular statement showing estimated amounts of underground water available in the various basins in the Republican River basin in the three states and amounts of land to which such water supplies could be applied within the economic limits he had assumed.
>
> "Mr. Burleigh advised the Commission that, in view of the fact that numerous applications had been made to his department by landowners thruout [sic] the basin, he was desirous of obtaining a statement from the Commission as to whether the amounts of *underground waters* he had determined would be feasibly possible of use, would, in the opinion of the Commission, exceed the *allotments of water to each state* which the Commission may have agreed upon; that his department did not want to recommend developments of underground water supplies in excess of the allocations of water to each state.
>
> "He advised the Commission also that his department is advising with the U.S. Bureau of Reclamation with a view of reaching an understanding concerning the scope of future developments within the basin, both of surface and

> underground waters, which would not be overlapping in effect Upon inquiry, Mr. Burleigh advised the Commission that *all of the underground waters of the basin above Scandia, Kansas, are included in the total water supplies of the basin,* as reflected in measurements of stream flow at Scandia and other points in the basin, and that *any underground water developments must be considered as reducing to that extent the amount of surface water available for use within the basin." Ibid.* (emphasis added).

Mr. Burleigh's desire for a statement from the Commission was soon satisfied. On January 31, 1941 the Colorado Commissioner, M.C. Hinderlider, wrote to his fellow Commissioners, George S. Knapp of Kansas and Wardner G. Scott of Nebraska, with reference to Mr. Burleigh's request:

> "It is my understanding that Mr. Knapp will address a letter to Engineer Burleigh of the Bureau of Agricultural Economics, advising him that the commissioners are in agreement that the estimated amount of ground water which may be developed in each of the tributary basins of the Republican River basin are within the allocations which the Commission has tentatively made." January 31, 1941 M.C. Hinderlider Letter to George S. Knapp and Wardner G. Scott, attached hereto as Appendix C.

Actually, Mr. Knapp had already addressed that letter to Mr. Burleigh on the day before, January 30, 1941. His letter reads in its entirety:

> January 30, 1941
>
> Mr. Harry P. Burleigh,
> Hydraulic Engineer,
> Bureau of Agricultural Economics,
> Amarillo, Texas.

Dear Mr. Burleigh:

We, the Republican River Compact Commissioners on the Republican River, meeting at Topeka on January 28, examined the tables which you submitted to us on the 27th indicating the approximate recommendations for consumptive use of water by basins in the three states, and find that the total estimated annual consumptive use of water is within the amount of the water supply available in the basin above Hardy, and that the proposed allocations in each of the several states fall within the amounts which the Commission may see fit to allocate to each state.

Please accept our thanks for meeting with us and supplying us with these figures.

Sincerely yours,

Geo. S. Knapp
Commissioner for Kansas
For the Commission

GSK:MM
CC to M. C. Hinderlider
Wardner Scott

Thus, the Commissioners jointly notified the U.S. Bureau of Agricultural Economics that the groundwater amounts they considered feasible for the various sub-basins within the Republican River Basin were within the basin Virgin Water Supply that they were considering for allocation in the Compact.

The deliberations of the Commissioners of the three States resulted in an agreement in Denver on March 19, 1941. The next day, Colorado's Commissioner, M.C. Hinderlider, addressed a letter to Ralph L. Carr, the Governor

of Colorado, which included a specific reference to the reliance of the Commission on "a voluminous report of the Bureau of Agricultural Economics of the U.S. Department of Agriculture on the underground water resources of the Republican River basin and their availability for beneficial application to the future development of the basin." M.C. Hinderlider Letter to Ralph L. Carr, March 20, 1941, attached hereto as Appendix E. Mr. Hinderlider then proceeded to describe the specific allocation to his State in the following words: "*The compact allocates* to Colorado, its citizens, agencies, associations and corporations *all of the surface and underground water supplies* originating in Colorado within the Frenchman and Red Willow Creek drainage basins " *Ibid.* (emphasis added). This reaffirms the Colorado Commissioner's understanding that groundwater use was intended to be included in the allocations made in the Compact.

There are also strong indications that the Federal Government shared the understanding of the State commissioners that groundwater use was included in the consumptive use allocations in the Compact. The U.S. Bureau of Reclamation's Chief Engineer S.O. Harper received a memorandum dated May 21, 1941 from another Bureau of Reclamation official, J.R. Riter, which included a discussion of the term "Virgin Water Supply" as that term was used in the proposed compact. Mr. Riter stated:

> "Under the compact each state is accorded a limited 'beneficial consumptive use' regardless of whether such waters are derived from virginal natural flow, captured storage water,

> return flow from irrigation, *groundwaters recovered by pumping*, recovered waste water, or otherwise. In short, the compact merely defines the extent to which streams may be depleted regardless of the methods of use." J.R. Riter Memorandum to S.O. Harper, May 21, 1941, attached hereto as Appendix F (emphasis added).

Riter concluded by saying that he "believed that the compact as prepared accomplishes the purposes set forth in the preamble thereof, and that it should be ratified by Congress." *Ibid.* Harper, the Chief Engineer of the Bureau of Reclamation, subsequently endorsed Riter's views in a transmittal to the Commissioner of Reclamation dated May 24, 1941, attaching the full Riter memorandum. The May 24, 1941 transmittal of the Chief Engineer is attached hereto as Appendix G.

Further, the Bureau of Reclamation's engineer in charge of the Republican River investigations, C.T. Judah, in a letter to the Bureau's Chief Engineer, described meetings he had attended that were held to acquaint county land use planning committees with the Bureau of Agricultural Economics' plans to develop groundwater:

> "Overlapping interests of both agencies were pointed out to local interests and fundamental differences in types of developments were explained. A special effort was made to impress on local people that *water supplies for both ground water pumping and for gravity stream diversions were from the same source* and that new *developments supplied by either source would be limited to the amount of water allocated to each state under the*

> *proposed compact.*" C.T. Judah Letter to S.O. Harper, May 31, 1941, attached hereto as Appendix H (emphasis added).

This letter indicates that federal water officials were fully cognizant of the hydraulic connection between surface water and groundwater in the Republican River Basin and that considerable efforts had been made to impress that fact on people in the basin. Moreover, it shows the conviction of federal water officials that the allocations to each State under the proposed compact applied to uses made of both surface water and groundwater.

The thorough understanding of the hydraulic relationship between groundwater and surface water among federal water officials is shown by a statement of the same Bureau of Reclamation engineer in charge of Republican River investigations. In a memorandum to the Bureau's Hydraulic Engineer, concerning the draft BAE report, he states:

> "There is a general conflict of interest in the basin between the B.A.E. and the Bureau of Reclamation, since *consumptive use of water on areas irrigated by pumping from wells will naturally deplete river flows* available for development similar to those the Bureau may contemplate." C.T. Judah Memorandum to Hydraulic Engineer, U.S. Bureau of Reclamation, March 17, 1941, a transcription of which is attached hereto as Appendix D (emphasis added).

As noted above, the compact that was negotiated in 1940 and 1941 was ultimately vetoed by President Roosevelt on April 2, 1942. Through subsequent negotiations in which a federal representative participated, the proposed

compact was then altered to address the concerns expressed by President Roosevelt. The apportionment among the States in the various sub-basins of the Republican River was not changed, however. *Compare* H. R. 5945, 77th Cong. 1st Sess. Art. III (1941), attached hereto as Appendix I, *with* S. 649, 78th Cong. 1st Sess. Art. IV (1943), attached hereto as Appendix K. The Colorado Commissioner, Mr. Hinderlider, confirmed the retention of the earlier apportionment in his letter to the Governor of Colorado forwarding the second version of the Compact: "The draft of the Compact, herewith transmitted, does not in any way change the allocations of water to the signatory States provided for in the former Compact." M.C. Hinderlider Letter to Governor Ralph L. Carr, January 9, 1943, attached hereto as Appendix L. Significantly, Mr. Hinderlider confirmed that the allocations in the final Compact applied not only to surface water but to groundwater uses as well: "These allocations include not only surface, but also sub-surface, or underground water supplies." *Ibid.*

Colorado Commissioner Hinderlider also prepared an explanatory statement and report to the 34th General Assembly of Colorado, which is reproduced and attached hereto as Appendix M. In that report, Commissioner Hinderlider stated, "It is believed that this Compact equitably apportions the total available average annual virgin water supplies of the Basin, both surface and underground, among the three signatory States " *Id.* at M10.

Mr. Hinderlider submitted his report not only to his own legislature in Colorado, but also to the federal representative, Glenn L. Parker, and to George S. Knapp and

Wardner G. Scott, the Kansas and Nebraska Commissioners, respectively. M.C. Hinderlider Letter to Glenn L. Parker, February 5, 1943, a transcription of which is attached hereto as Appendix N. In his letter, Commissioner Hinderlider said, "I would be pleased to have your observations, criticisms, etc., on my explanatory article." *Id.* No record of any response to this request has been found. Soon thereafter, the State legislatures approved the Compact. As noted above, the State of Kansas approved the Compact on February 22, 1943, the State of Nebraska approved the Compact on February 24, 1943, and the State of Colorado approved the Compact on March 15, 1943. Thus, there is definitive evidence that all three State commissioners and the federal representative collectively understood, at the time of the approval of the Compact by their respective governments, that the use of both surface and underground waters within the basin was included in the allocations in the Compact.

As the foregoing records of the negotiations and related correspondence and legislation reflect, the Compact Commissioners representing each of the Compacting States and the federal officials advising the Compact Commission and the Federal Government all understood, at times critical to the negotiations and ratification of the Compact, the hydraulic connection between groundwater and surface water in the Republican River Basin and the intent of the Compact to include consumptive use from both surface water and groundwater in the Compact allocations.

III. Nebraska's Arguments that the Compact Does Not Restrict Consumption of Groundwater Are Without Merit.

A. Nebraska Misstates the Kansas Claim.

Nebraska begins its Brief with the statement, "In its Complaint, Kansas lays claim to vast quantities of groundwater located in Nebraska." Nebraska Brief 1. It also states, "Kansas' claim to Nebraska's groundwater is, therefore, a claim for which Kansas cannot be granted relief." *Id.*, at 5. Nebraska fundamentally misapprehends Kansas' claim. Kansas is not "lay[ing] claim to vast quantities of groundwater located in Nebraska." Neither is Kansas laying claim to "Nebraska's groundwater." Rather, Kansas is simply claiming that Nebraska has exceeded its consumptive use limitations under the Republican River Compact when all of Nebraska's consumptive use of Republican River surface waters and hydraulically connected groundwaters in the alluvial and Ogallala aquifers is taken into account. See Bill of Complaint ¶¶ 7-11. Because the Compact allocates all of the Virgin Water Supply of the Republican River Basin, overuse by Nebraska has resulted in depletion of surface flows to the State of Kansas. Nevertheless, Nebraska may allow a certain amount of pumping of alluvial and Ogallala groundwater, so long as the effects of such pumping on the surface flows of the Republican River are offset as necessary to keep Nebraska's total consumptive use within Nebraska's Compact allocation.

B. The Term "Virgin Water Supply" Includes Both Surface Water and Tributary Groundwater.

Nebraska argues that the absence of the word "groundwater" or like terms in the Compact must lead to the conclusion that the Compact does not restrict consumption of groundwater. Nebraska Brief 3, 5, 8-10. Nebraska fails to point out, however, that the term "surface water" also does not appear in the Compact. The term used is "Virgin Water Supply," which is defined to be "the water supply within the Basin undepleted by the activities of man." Art. II, ¶ 3. This term is not limited either to surface water or groundwater, but reflects the intent of the compacting States to allocate the entire flow of the Republican River as it would occur undepleted by any activities of man. As demonstrated above, when the Compact was drafted, the activities of man most likely to deplete the Virgin Water Supply were surface water diversions and groundwater pumping. Both are clearly "activities of man," and both were known to deplete surface flows at the time of the Compact.

Nebraska's argument is simplistic. The question is not whether groundwater was apportioned by the Compact, but whether the States and Congress, in apportioning the Virgin Water Supply, intended to account for the effects of any activities of man in the basin on the flows of the river other than direct diversion of river flows. Obviously they did, because they defined the Virgin Water Supply generally as the water supply "undepleted by the activities of man." In other words, to the extent that groundwater pumping, an activity of man, depleted

river flows, the negotiators intended that such groundwater pumping be restricted by the Compact.

Nebraska anticipates that Kansas will argue that this Court has previously found groundwater to be apportioned by compacts even though they did not contain the word "groundwater." Nebraska Brief 10. Again, however, the Nebraska formulation is simplistic. The question is not whether previous decisions of the Court have determined that groundwater was apportioned by other compacts but whether such compacts restricted groundwater consumption, as stated in the Court's delineation of the question for Nebraska's Motion to Dismiss. The two leading decisions addressing that question are *Kansas v. Colorado*, 514 U.S. 673 (1995), and *Texas v. New Mexico*, 482 U.S. 124 (1987). Nebraska does not deny that in both of these cases the Court found a violation of an interstate compact allocating surface flows that had been excessively depleted by groundwater pumping.

In *Kansas v. Colorado*, the Court specifically held that post-compact well pumping in Colorado had violated the Arkansas River Compact. 514 U.S. at 693-694. The Court so held despite the fact that the Arkansas River Compact does not use the word "groundwater" or like terms. See Arkansas River Compact, 63 Stat. 145 (1949).

The Pecos River Compact, 63 Stat. 159 (1949), is another interstate river compact that apportions surface flows without mentioning groundwater. Yet the Court enforced the Pecos River Compact against New Mexico for depletions caused largely by groundwater consumption. As the Court noted, "If development in New Mexico were not restricted, especially the groundwater pumping

near Roswell, no water at all might reach Texas in many years." *Texas v. New Mexico*, 462 U.S. 554, 557 (1983); see also *id.* at 557-558 nn. 2, 3. The centrality of the concern about groundwater pumping in *Texas v. New Mexico* is confirmed by Special Master Jean S. Breitenstein's September 7, 1979 Report, which states, at page 44: "Although hidden in a mass of semantics and mathematics, the heart of this controversy is the pumping of ground water in New Mexico." When the Court entered an injunction against New Mexico to comply with the Pecos River Compact, 485 U.S. 388 (1988), the Court was effectively restricting the use of groundwater in New Mexico even though the Pecos River Compact said nothing expressly about groundwater.

Nebraska responds that the States of New Mexico and Colorado simply "failed to plead or argue that groundwater was **not** subject to their respective Compacts." Nebraska Brief 10 (emphasis in original). But, while the States of Colorado and New Mexico may not have been bold enough to claim that groundwater was not restricted under those Compacts, the amount of depletion by groundwater pumping was a point of contention in both cases, and the Court was fully aware of the groundwater consumption element. Moreover, each State had officially recognized the potential of groundwater pumping to deplete river flows by the time the respective complaints were filed. The Motion for Leave to File Bill of Complaint in *Texas v. New Mexico*, No. 65, Original, was granted in 1975. 421 U.S. 927 Thirteen years earlier, for purposes of intrastate water administration, the New Mexico Supreme Court had formally recognized the potential for groundwater pumping to deplete

surface flows. See *City of Albuquerque v., Reynolds*, 72 N.M. 428, 379 P.2d 73 (1962). Similarly, in *Kansas v. Colorado*, No. 105, Original, the Motion for Leave to File Complaint was granted in 1986. 475 U.S. 1079. Colorado had recognized the interconnection of surface water and groundwater at least as early as 1965, when it enacted legislation formally requiring conjunctive administration of surface water and groundwater. 1965 Colo. Laws, ch. 318, § 1. Nebraska has still not fully recognized the potential of groundwater pumping to deplete surface flows, and therein may lie the reason that Nebraska is making the present argument while New Mexico and Colorado did not.

Nebraska suggests that it is significant that none of the compacting States regulated groundwater within the State at the time that the Compact was adopted. Nebraska Brief 16. The relevance of this assertion is not altogether clear. Moreover, as shown above, the defendant States in the *Texas v. New Mexico* and *Kansas v. Colorado* compact enforcement proceedings did not regulate groundwater at the time that the Pecos River and Arkansas River Compacts were adopted. Nevertheless, the lack of intrastate regulation of groundwater did not deter this Court from interpreting the compact in each case to effectively limit groundwater use pursuant to the compact allocations.

Nebraska argues that the lack of development on the Republican River at the time of the Compact is grounds for distinguishing the Republican River Compact from the Arkansas River and Pecos River Compacts. Nebraska Brief 10. The claimed distinction is without substance, however. Each of the three Compacts set a certain interstate apportionment of the waters of each stream. The

question is the same in each case: Did the parties to the Compact intend that the apportionment to which they had solemnly agreed could be circumvented by means of groundwater pumping in the upstream State? Kansas submits that the parties to the Republican River Compact could not have so intended. This Court made the same implicit determination in *Texas v. New Mexico*, 482 U.S. 124 (1987), and in *Kansas v. Colorado*, 514 U.S. 673 (1995).

C. The *Sporhase* Decision and the Brief Endorsed by Kansas in that Case are Consistent with Kansas' Position that the Compact Restricts Consumption of Groundwater.

Nebraska overstates the Court's passing reference to the Compact in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), when it claims that the "Court previously noted the Compact concerns surface water rather than groundwater." Nebraska Brief 1; see also *id.*, at 3, 11-12. The Court was faced in that case with the State of Nebraska's "suggestion that Congress has authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water." 458 U.S., at 958. The Court held that the federal statutes deferring to state water law and interstate compacts "do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Id.*, at 959-960. Thus, the Court was not considering the present question, namely, whether the Republican River Compact restricts groundwater pumping in the Republican River basin for purposes of the consumptive use limitations in the Compact and the delivery obligations downstream to Kansas. Nevertheless, the passing remark by the Court that "[t]he

interstate compacts to which appellee refers are agreements among States regarding rights to surface water," *id.*, at 959, is correct. The Virgin Water Supply under the Republican River Compact is the flow that would occur in the River if it were undepleted by man's activities. Thus, there is nothing inconsistent between even the brief reference to the Republican River Compact in *Sporhase* and the position urged by Kansas in this case.

Nebraska urges that an amicus brief filed in support of Nebraska in the *Sporhase* case by Colorado, which Kansas endorsed, is inconsistent with Kansas' position that the Compact restricts groundwater consumption in this case. Nebraska Brief 1, 2, 4, 12-13. Contrary to Nebraska's suggestion, however, Kansas is not claiming that the Ogallala aquifer has been apportioned to Kansas. Rather, Kansas contends that the natural discharges from that aquifer to the Republican River and its tributaries cannot be depleted by the activities of man without accounting for those depletions as beneficial consumptive use under the Republican River Compact.

D. The States Have Traditionally Administered the Compact on the Basis that Groundwater Consumption Is Restricted by the Compact.

The First Annual Report of the Republican River Compact Administration ("RRCA") states that on April 4, 1961 the Administration accepted "Formulas for the Computation of Annual Virgin Water Supply, Republican River Basin" ("VWS Formulas") proposed by the Administration's Committee on Procedure for Computation of Annual Virgin Water Supply. RRCA, 1st Annual Report 2

(1961). An excerpt of the VWS Formulas is attached hereto as Appendix O. The formulas for each of the subbasins' Virgin Water Supply add in "the irrigation diversions from groundwater" and subtract "the return flows from the lands irrigated by diversions from groundwater." VWS Formulas 6-14. Thus, the consumptive use, which is the difference between diversions and returns, is included as part of the Virgin Water Supply determination. The General Procedures in the VWS Formulas provide, however, that the groundwater referred to in the formulas shall be limited to the alluvium until further information is available on wells outside the alluvium. The General Procedures are attached hereto as Appendix O to this Brief. The paragraph in the General Procedures regarding groundwater diversions reads as follows:

> "Irrigation diversions from ground water shall be limited to those by wells pumping from the alluvium along the stream channels. The determination of the effect of pumping by 'table-land' wells on the flows of the streams in the Republican River Basin must await considerably more research and data regarding the character of the ground-water aquifers and the behavior of ground-water flow before even approximate information is available as to the monthly or annual effects on stream flows. The ground-water representatives of the Geological Survey and the University of Nebraska reported that the effect of pumping by 'table-land' wells is not subject to an exact determination and that it is possible those wells may not appreciably deplete stream flows. The wells in the Frenchman Creek drainage basin in Colorado have been considered as 'table-land' wells." Formulas for the Computation of Virgin Water Supply,

Republican River Basin, General Procedures, a transcription of which is attached hereto as Appendix O.

"Table-land" wells are the non-alluvial wells pumping from the Ogallala aquifer.

The VWS Formulas reveal the understanding of the chief State water administrators in several respects as of the inception of the formal administration of the Compact. First, only alluvial groundwater is immediately included in the formulas. Second, inclusion of the effects of "table-land" (Ogallala) pumping is deferred until the nature of those effects is better known. Third, once the effects of Ogallala pumping are known, those effects are to be included in the formulas. Thus, the first actions to actively administer the Compact included formulas adopted by all three States recognizing that groundwater consumptive use must be accounted for in administering the Compact. The understanding of the water administrators of the compacting States included both alluvial and Ogallala pumping as being within the allocations of the Compact to the extent that they affect the flows of the Republican River and its tributaries.

For some three decades, the three States adhered to the initial understanding of the States' chief water officials that the effects of both alluvial and Ogallala pumping on the Republican River and its tributaries were to be included in determinations of the Virgin Water Supply to the extent that they could be determined. Alluvial well pumping was assumed to affect the surface flows immediately to the full extent of the consumptive use. Ogallala well pumping was explicitly reserved until the effects of such pumping could be quantified. The formulas

embodying that understanding are still in effect today. Nor has any of the three States suggested amending those Formulas with regard to the inclusion of groundwater consumptive use. It was not until approximately 1990 that Nebraska began separately to take the position that groundwater pumping was not restricted by the Compact. See, *e.g.*, RRCA, 30th Annual Report 13 (1990).

There is little substance to Nebraska's claim that "[h]istorically, none of the states have viewed the Compact as authorizing the regulation, allocation or distribution of groundwater." Nebraska Brief 3. Nebraska does not even refer to the Administration's annual reports in making its assertion. Rather, Nebraska relies on largely irrelevant decisions of the various State supreme courts. *Id.* at 3, 13-15. Early in its Brief, Nebraska states, "The Nebraska Supreme Court has never held that the Compact authorizes the regulation, allocation or distribution of groundwater," citing *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W. 2d 614 (1981). Nebraska Brief 3. That decision of the Nebraska Supreme Court does not even mention the Republican River Compact, however. Therefore, it seems a questionable basis upon which to draw any conclusion regarding the meaning of the Republican River Compact.

Nebraska next relies on *State ex rel. Peterson v. Kansas State Board of Agriculture*, 158 Kan. 603, 149 P.2d 604 (1944), to support its contention that the "Kansas Supreme Court has never recognized the Compact as a state or federal law creating the authority to regulate the use of groundwater." Nebraska Brief 13. Here again, the Republican River Compact was never mentioned. That case concerned the Equus Beds in south-central Kansas, a

considerable distance from the Republican River Basin. The question was whether the State had statutory authority to regulate the use of groundwater from the Equus Beds. The Court held that the State officials had no authority to regulate groundwater use from the Equus Beds. That holding, therefore, does not support Nebraska's contention. Again, the contention itself, even if true, would be of questionable value.

The *Kansas State Board of Agriculture* case is a slender reed on which to rest an authoritative interpretation of the Republican River Compact. The Kansas Supreme Court did not even mention the Republican River Compact in that case. Thus, the Supreme Court of Kansas was certainly not considering the question now before this Court, namely, whether, as between States, groundwater pumping can be restricted in order to provide each State its allocation under the Republican River Compact.

Nebraska incorrectly analyzes the Kansas case of *State ex rel. Emery v. Knapp*, 167 Kan. 546, 207 P.2d 440 (1949). Nebraska Brief 14. In that case, the Supreme Court of Kansas was asked to rule upon the constitutionality of the Kansas Water Appropriation Act of 1945 which had been adopted partially in response to the earlier ruling of the Supreme Court of Kansas in *Kansas State Board of Agriculture*. The Kansas Supreme Court upheld the constitutionality of the new Act. Whether the Republican River Compact restricted groundwater use in another state, the question in this case, was not at issue.

Nebraska also cites *Pioneer Irrigation District v. Colorado*, 658 P.2d 842 (Colo. 1983) for the proposition that the Colorado Supreme Court has concluded that the Compact

regulates surface water only. Nebraska's reliance on *Pioneer Irrigation District v. Colorado* is misplaced. The issue before the Colorado Supreme Court was a different one, namely, whether the Colorado Groundwater Commission was the proper forum to make the initial determination of facts affecting its administrative jurisdiction. That case did mention, however, an earlier administrative determination by the Colorado Groundwater Commission that was based on the very legal principle asserted by Kansas in this Brief: If groundwater use affects surface flows of the Republican River and its tributaries, that groundwater use is subject to the Republican River Compact.

E. Only this Court Can Authoritatively Interpret the Compact as Between the States.

Nebraska's reliance on State supreme court decisions also founders at a more fundamental level. State supreme courts lack jurisdiction to determine interstate controversies. *E.g., West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22, 28 (1951):

> "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States is the function and duty of the Supreme Court of the Nation."

That jurisdiction is explicitly reserved to this Court under Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1251(a). Thus, while an interstate compact may be relevant to the disposition of a dispute between parties other than the compacting States, no other court has jurisdiction to decide controversies between States that arise under a compact. See *Mississippi v. Louisiana*, 506 U.S. 73 (1992). *Mississippi v. Louisiana* originated as a property dispute between rival private claimants, the outcome of which depended upon whether the land in dispute was located in Mississippi or Louisiana. While the decision of the lower courts was allowed to stand as between the private litigants, the lower court determination of which State encompassed the land in dispute was not binding as between the States even though the States were parties to the litigation. Likewise, the State supreme court decisions relied upon by Nebraska are without any legal effect as between the States. The respective rights of the States under the Republican River Compact can be decided by this Court alone.

F. Nebraska's Position is Inconsistent with Its Position in *Nebraska v. Wyoming*, No. 108, Original.

In *Nebraska v. Wyoming*, No. 108, Orig., Nebraska has taken the position that increased groundwater pumping in Wyoming "is presently violating and threatens to violate the State of Nebraska's equitable apportionment established by the Court by depleting the natural flows of the North Platte River. " *Nebraska v. Wyoming*, 515 U.S. 1 (1995), Special Master Third Interim Report, Nebraska's Amended Petition ¶ 11, App. D at D-4 to D-5 (Sept. 9,

1994). Nebraska prays for an order "enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree." *Id.*, at D-6 to D-7. The Decree that Nebraska claims has been violated by Wyoming's groundwater uses was entered by the Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953). That Decree makes no mention of groundwater in its apportionment. Nevertheless, Nebraska alleges that Wyoming's upstream groundwater development is violating Nebraska's equitable apportionment of surface water. Likewise, Kansas alleges in this case that Nebraska's upstream groundwater development is violating Kansas' equitable apportionment of surface water. Thus, Nebraska's allegations in *Nebraska v. Wyoming* support Kansas' position that the Republican River Compact restricts a State's consumption of groundwater.

CONCLUSION

Nebraska's Motion to Dismiss should be denied.

Respectfully submitted,

CARLA J. STOVALL
Attorney General of Kansas
JOHN W. CAMPBELL
Chief Deputy Attorney General
DONALD L. PITTS
Assistant Attorney General
LELAND E. ROLFS
AMY L. AUFDEMBERGE
Special Assistant Attorneys General

JOHN B. DRAPER
Counsel of Record
Special Assistant Attorney General
ANDREW S. MONTGOMERY
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

September 10, 1999

Appendices

Table of Contents

Description	Appendix
January 11, 1940 Nebraska Governor R.L. Cochran Letter to E. Porter Ahrens, President of the Kansas Republican Valley Irrigation and Flood Control Association	A
Minutes of the Fourth Meeting of the Republican River Compact Commission at Topeka, Kansas on January 27-28, 194	B
January 31, 1941 Compact Commissioner M.C. Hinderlider Letter to Compact Commissioners George S. Knapp and Wardner G. Scott	C
March 17, 1941 U.S. Bureau of Reclamation Engineer in Charge of Republican River Investigations C.T. Judah Memorandum to Bureau of Reclamation Hydraulic Engineer (excerpts)	D
March 20, 1941 Compact Commissioner M.C. Hinderlider Letter to Colorado Governor Ralph L. Carr	E
May 21, 1941 Bureau of Reclamation Engineer J.R. Riter Memorandum to Bureau of Reclamation Chief Engineer S.O. Harper (excerpts)	F
May 24, 1941 U.S. Bureau of Reclamation Chief Engineer S.O. Harper Memorandum to Commissioner of Reclamation	G
May 31, 1941 U.S. Bureau of Reclamation Engineer in Charge of Republican River Investigations C.T. Judah Letter to Bureau of Reclamation Hydraulic Engineer	H
H.R. 5945, 77th Congress, 1st Session (1941)	I

Appendices

Table of Contents – Continued

April 2, 1942 Message from the President of the United States Returning Without Approval the Bill (H. R. 5945) Granting the Consent of Congress to Compact Entered Into by the States of Colorado, Kansas, and Nebraska With Respect to the Use of the Waters of the Republican River Basin, H. R. Doc. No. 690, 77th Cong., 2d Sess. (1942) .. ..J

S. 649, 78th Congress, 1st Session (1943) ... ...K

January 9, 1943 Compact Commissioner M.C. Hinderlider Letter to Colorado Governor Ralph L. Carr L

Explanatory Statement and Report to the Thirty-fourth General Assembly by M.C. Hinderlider, Republican River Compact Commissioner for Colorado (1943) .... M

February 5, 1943 Compact Commissioner M.C. Hinderlider Letter to Federal Representative Glenn L. Parker ....N

General Procedures, Formulas for the Computation of Annual Virgin Water Supply, Adopted by the Republican River Compact Administration April 4, 196 ....O

APPENDIX A

January 11th, 1940.

Mr. E. Porter Ahrens
Scandia, Kansas.

Dear Mr. Ahrens:

Thank you for your letter of recent date with regard to the meeting of the Governors at McCook with reference to flood control and development of the Republican River Valley.

The desire is to obtain an agreement of a compact as early as possible. A compact between states in order to be effective must be endorsed by the legislatures of each state and possibly by the national congress. It is hoped, in the meantime, that studies going on on the part of the Reclamation Service and the Army Engineers will dovetail with the activities of the states, assisting the states on the one hand in agreeing upon a compact and on the other assisting the federal agencies because of the activities of the State Commissioners.

Mr. Page, Commissioner of Reclamation, stated at the Denver meeting of the Reclamation Association that a compact between states was absolutely essential as a condition precedent to any project approval on the part of the Reclamation Service.

Trusting this answers your inquiry, I remain

Very sincerely yours,

Governor of Nebraska

APPENDIX B

Minutes of the Fourth Meeting of the Republican River Compact Commission at Topeka, Kansas, on January 27-28, 1941

Present:

M.C. Hinderlider,	Commissioner for Colorado
George S. Knapp,	Commissioner for Kansas
Wardner G. Scott,	Commissioner for Nebraska
R.H. Willis,	Chief, Bureau of Irrigation, Water Power and Drainage, Dept. of Public Works, Nebraska
John Riddell,	Ass't Att'y Gen'l of Nebraska

Meeting convened at 10 A. M. in the hearing room of the State Board of Agriculture in the Capitol Building. The following gentlemen appeared before the Commission to express their views concerning needs for water developments and water conservation in the Republican River basin in Nebraska and Kansas.

Don P. Postlethwaithe, attorney of St. Francis, Kansas, who talked on the needs of the valley in that section of the state;

M.O. Ryan, representing a number of organizations in the Republican River valley in Nebraska and Kansas, who spoke in behalf of the needs of the residents in the area represented by him;

Dr. E. P. Ahrens of Scandia, Kansas, who spoke in behalf of needs for flood control and water for reclamation and other benefits in the lower basin of the Republican River.

All these gentlemen expressed the hope that a compact may be consummated and ratified by the Legislatures of the three states at an early date, and assured the Commission of their full support in the efforts of the Commission to attain this objective. They expressed the view that any conclusions reached by the Commission, they felt confident, would be approved by the water users thruout the basin.

Mr. Harry P. Burleigh and Associate Robt. M. Barkley, representing the U. S. Bureau of Agricultural Economics, with offices at Amarillo, Texas, appeared before the Commission and outlined the scope of the work which the Bureau has been carrying on thruout the Republican River basin to determine the extent and useability of the underground waters of the basin and the availability of lands which could be reclaimed thereby in tributary basin areas. Mr. Burleigh advised the Commission that it is now contemplated the complete report of the Bureau will be available for distribution to the commissioners not later than three weeks from date.

Mr. Burleigh explained at considerable length the nature of these investigations and the basis of determinations of water supply and available land areas, limits of pumping lift, limits of cost per acre used in his determinations and many other factors. He also presented the Commission with a tabular statement showing estimated amounts of underground water available in the various basins in the Republican River basin in the three states and amounts of land to which such water supplies could be applied within the economic limits he had assumed.

Mr. Burleigh advised the Commission that, in view of the fact that numerous applications had been made to his department by land owners thruout the basin, he was desirous of obtaining a statement from the Commission as to whether the amounts of underground waters he had determined would be feasibly possible of use, would, in the opinion of the Commission, exceed the allotments of water to each state which the Commission may have agreed upon; that his department did not want to recommend developments of underground water supplies in excess of the allocations of water to each state.

He advised the Commission also that his department is advising with the U. S. Bureau of Reclamation with a view of reaching an understanding concerning the scope of future developments within the basin, both of surface and underground waters, which would not be overlapping in effect, to the end that a rational program of development by both federal agencies might be carried out in the future without the danger of over-development by either agency to the detriment of developments by the other agency. Upon inquiry, Mr. Burleigh advised the Commission that all of the underground waters of the basin above Scandia, Kansas, are included in the total water supplies of the basin, as reflected in measurements of stream flow at Scandia and other points in the basin, and that any underground water developments must be considered as reducing to that extent the amount of surface water available for use within the basin.

At the afternoon session, Engineer W.J. Ware of the U. S. Engineers Office at Kansas City appeared, at the invitation of the Commission, and discussed present progress of the studies and reports on flood control and

multiple use projects in the Republican River basin. Mr. Ware advised the Commission that, in conformity with former understanding of the Commission, his department is reviewing its former reports concerning the economic feasibility of the various reservoir projects which have been investigated thruout the basin, to determine if the excess benefits over costs resulting from the building of the Harlan County Reservoir, could be so distributed over other storage reservoirs thruout the basin as to show the benefits from constructing such reservoirs would exceed the estimated costs thereof. The Commission was advised, however, that, even though the results of such studies were favorable to the development of a number of storage reservoirs for flood control or multiple-purpose projects, there is no certainty that his department would recommend such program of developments in lieu of the single development of the Harlan County reservoir, which is designed for a major purpose.

Mr. Ware also advised the Commission that his department expects to give consideration to data furnished by the Bureau of Reclamation concerning any reservoirs or projects which are being investigated by the Bureau, but that such information will have to be available to the Corps before June 1, 1941, since the supplemental report of the Corps of Engineers cannot be delayed later than that date.

January 28, 1941

Meeting of the Commission convened in the Jayhawk Hotel at 10 A.M., with all members present.

The Commission resumed its studies on water supply and tentative allocations, which had been temporarily

suspended at the last meeting in Lincoln. This work consumed the entire day. After making some adjustments of previous figures, and reconstructing present stream flow in the light of all present available knowledge concerning past uses of water within the basin, the members of the Commission were in substantial agreement, both as to principles and as to allocations of water to the three states.

In this connection, the Commission gave consideration to a preliminary draft for an interstate compact, which had been prepared by Commissioner Hinderlider and presented to the Commission on January 27th. The members of the Commission were in general agreement concerning the terms of the tentative draft, but reserved any final conclusions until the tentative draft could receive further study and approval of the Attorneys General of the three states.

The Commission adjourned its deliberations at 5 P.M., with the understanding that the Commission would convene again at Denver, Colorado, on the 15th of February.

/s/ M.C. Hinderlider
Commissioner for Colorado

/s/ George S. Knapp
Commissioner for Kansas

/s/ Wardner G. Scott
Commissioner for Nebraska

APPENDIX C

[Letterhead partially omitted]

STATE OF COLORADO

ENGINEERING DEPARTMENT
DENVER

January 31, 1941

SUBJECT:

Mr. George S. Knapp
Republican River Compact Commissioner
Topeka, Kansas

Mr. Wardner G. Scott
Republican River Compact Commissioner
Lincoln, Nebraska

Gentlemen:

I am enclosing draft of the minutes of the third and fourth meetings of the Republican River Compact Commission at Lincoln and Topeka, respectively.

I have included suggested changes by Mr. Knapp in the minutes covering the Lincoln meeting. As will be noted, I have signed the copies of the minutes of these two meetings and, if you approve the same, I will request that you advise me accordingly, – otherwise approval can await our next meeting on the 15th of February.

I am also enclosing some additions to the preliminary draft for a compact as suggested by Governor Carr and Attorney General Ireland.

It is my understanding that Mr. Knapp will address a letter to Engineer Burleigh of the Bureau of Agricultural Economics, advising him that the commissioners are in

agreement that the estimated amount of ground water which may be developed in each of the tributary basins of the Republican River basin are within the allocations which the Commission has tentatively made.

Very truly yours,

/s/ M.C. Hinderlider
Republican River Compact
Commissioner

MCH:EP
CC: R.H. Willis

[Enclosures omitted]

APPENDIX D

Denver, Colorado, March 17, 1941.

JRR:AZK

MEMORANDUM TO HYDRAULIC ENGINEER
(C. T. Judah)

Subject: Water Facilities Area Plan, Republican River Basin, Nebraska.

1. Reference is made to the Hydraulic Engineer's letter of March 6, 1941, subject as above.

2. The report covers general farming, grazing, and irrigation practices, and the general financial conditions of residents and farmers of 13 divisions of the basin, and makes recommendations for improvements in present practices and needs in each division.

3. It is concluded one of the basic needs of the basin is more irrigation to stabilize agriculture in general. Irrigation of 124,935 acres of land is recommended.

4. Irrigation developments are to be mostly small individual pumping units. Pumping is to be principally from wells, with some pumping from streams with sustained summer flows. Developments are to take place gradually over a period of several years as individual needs and desires arise. It is concluded that a gradual development of this type fits the needs of the basin much better than larger developments, that take place over relatively short periods of time.

5. Facility installation costs are estimated to vary from $15 to $25 per acre for each installation. Total installation costs have been estimated at $1,230,000 for 124,935 acres.

* * *

14. An average annual draft of about 18,600 acre-feet is to be pumped from wells in the Ogallala formation, principally on the headwaters of the Arickaree (6000 A.F.) and Beaver Creek (12,000 A.F.). Rainfall is comparatively light on these drainage areas and consumptive use will be high, since a large part of the drainage area is grazing land with considerable humus in the top soil, which soaks up the water and has a tendency to hold it, causing high evaporation losses. The Ogallala lies only a few feet below the surface, and penetration of water into it would be rather slow.

Contemplated Developments

15. There is a general conflict of interests in the basin between the B.A.E. and the Bureau of Reclamation, since consumptive use of water on areas irrigated by pumping from wells will naturally deplete river flows available for developments similar to those the Bureau may contemplate. Recommended irrigation developments by the B.A.E. and probable developments by the Bureau for various sub-basins are given as follows:

* * *

APPENDIX E

March 20, 1941

His Excellency, Ralph L. Carr
Governor of Colorado
Denver, Colorado

My dear Governor Carr:

I have the honor to transmit herewith for your consideration and further disposition two original drafts of a compact, which it is believed equitably apportions the waters of the Republican River basin between the States of Colorado, Kansas, and Nebraska. This compact, the result of several months of investigations, study, and eight conferences between the commissioners, their legal advisers, and water users of the three states, was signed at Denver on March 19, 1941, by the three compact commissioners appointed by the Governors of the signatory states.

Since it appears that no interest of the federal government, by virtue of ownership of property or of any responsibility as a result of interstate or international treaties, or obligations to Indian tribes, is involved, no representative of the government was invited to participate in the deliberations of the Commission, nor to approve its findings and conclusions.

In its deliverations, the Commission gave careful consideration to the report of the Division Engineer, Corps of U.S. Engineers, dated February 27, 1940, to the Chief of Engineers, covering the comprehensive study by the Corps on flood control in the Republican River basin and related matters, and to preliminary and progress

reports by the U.S. Bureau of Reclamation, which is conducting a comprehensive and detailed investigation of the land and water resources of this basin; also to a voluminous report of the Bureau of Agricultural Economics of the U.S. Department of Agriculture on the underground water resources of the Republican River basin and their availability for beneficial application to the future development of the basin.

While the absence of extensive development of the natural resources of the Republican River basin tended to simplify the problem of allocations of the waters therein, the Commission was confronted with other difficult problems involving a multiplicity of primary and secondary tributary streams, which are largely dissociated in their possibilities for use, and which, due to their erratic character, will require extensive regulatory works throughout the basin.

The compact allocates to Colorado, its citizens, agencies, associations and corporations all of the surface and underground water supplies originating in Colorado within the Frenchman and Red Willow Creek drainage basins; about 25 percent of those of the North Fork of the Republican; 80 per cent of those of the Arikaree River; 77 per cent of those of the South Fork of the Republican; and an estimated 100 per cent of those of the Beaver Creek basin, which it is believed is the limit of consumptive use which it is practicable to make in Colorado of the waters from these stream basins.

It should be borne in mind that these allocations of water are for beneficial consumptive use and do not limit the right of Colorado, or any of its agencies, to divert and

apply much greater quantities of water than the amounts allocated by the compact.

The compact, when ratified by the Legislatures of the signatory states and consented to by the Congress of the United States, provides the basis for an orderly planning of the regulation, conservation and efficient use of the waters of the basin, unhampered by uncertainties arising out of interstate conflicts or misunderstandings.

As hereinabove stated, it is believed that the compact equitably apportions between the signatory states all the waters of the Republican River basin. As commissioner for the State of Colorado, I therefore respectfully recommend that this compact be transmitted with a special message to the present General Assembly of our state for ratification.

In conclusion, I desire to express to you my deep sense of appreciation for the confidence reposed in me as the official representative of our state to carry out these important negotiations, and for the invaluable assistance from you as a result of your ripe experience in these interstate matters. I also desire to acknowledge the loyal support and valuable aid received from Attorney General Gail L. Ireland, who was my legal adviser during the final preparation of the compact, to Clifford H. Stone, Esquire, for valued suggestions; to Mr. A. C. Stiefel, assistant chief engineer of the Colorado Water Conservation Board, who prepared the map of the Republican River basin which is made a part of the compact, and to Senators Burt Ragan and Harry M. McKinney, and Representatives C.J. Buchanan and Harold A. Tabor, who have at all times given me sympathetic and loyal support.

Titles for Senate Bill No. 42, by Sentors Ragan and McKinney, and House Bill No. 188, by Representatives Buchanan and Tabor, have heretofore been introduced in the present Legislature, under which the compact, if approved by you, may be properly presented to the Legislature for final disposition.

Respectfully,

/s/ Hinderlider
Republican River Compact
Com'r for Colorado

MCH:EP

APPENDIX F

Denver, Colorado, May 21, 1941.

MEMORANDUM TO CHIEF ENGINEER

(J. R. Riter)

Subject: Republican River Compact – Colorado-Kansas-Nebraska.

1. Reference is made to teletype message May 12 from the Acting Commissioner as follows:

> "Please comment in detail air mail re Burkes letter May 6 Republican River compact."

2. The Bureau of Reclamation did not participate formally in the preparation of the compact, but from time to time as requested by the Compact Commissioners, various members of the investigation organization, especially Mr. C. T. Judah, engineer in charge of the Republican River Investigations, met with the Compact Commissioners and furnished them with available factual information, including runoff records secured by the Bureau of Reclamation. The Compact Commissioners are also furnished with copies of the Bureau's reconnaissance report of March 1940, showing potential development possibilities within the Republican River Basin. Several informal discussions were also held, particularly with Mr. Hinderlider, State Engineer of Colorado, in response to direct questions propounded by him regarding factual data secured from the Bureau's investigations in the Republican River Basin.

3. With respect to the questions propounded in paragraph 2 of the District Counsel's letter, it is believed that the following answers are applicable:

(a) "as to whether or not this compact was entered into with due inquiry", it is believed that this portion can be answered "yes"

(b) "that it represents honest exercise of judgment" This inquiry can be answered "yes"

(c) "and that it is equitable" This is a matter of opinion. The compact was formulated as the result of "meeting of minds" of the three interested states, and is believed to represent an honest effort toward equitable allocation of available waters.

* * *

8. In paragraph 9 the District Counsel raises the question, "Is it intended that 'virgin water supply' and 'natural waters' shall be considered as synonymous?" The answer to this question is "yes"

9. In paragraph 9 the District Counsel raises the question as to whether return flow waters are embraced within the term "virgin water supply" and also asks under the compact what is the legal status of return flow waters and have they been allocated. Whether or not return flow is, by legal interpretation, a part of natural flow or otherwise is immaterial. Under the compact each state is accorded a limited "beneficial consumptive use" regardless of whether such waters are derived from virginal natural flow, captured storage water, return flow from irrigation, ground waters recovered by pumping, recovered waste water, or otherwise. In short, the

compact merely defines the extent to which streams may be depleted regardless of the methods of use.

* * *

APPENDIX G

UNITED STATES

DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

CUSTOMHOUSE
DENVER, COLORADO

OFFICE OF THE CHIEF ENGINEER

May 24, 1941.

From Chief Engineer

To Commissioner

Subject: Republican River Compact.

1. Reference is made to office letter of May 7, to the District Counsel's letter of May 6, and to your teletype message of May 12, reading:

> "Please comment in detail air mail re Burke's letter May 6, Republican River Compact."

2. In view of the positive position taken by District Counsel Burke that an adverse report on the Republican River Compact should be filed with the Congress, I have asked District Counsel Baird and Engineer Riter, who have given this matter considerable study, to incorporate their views in memoranda covering, respectively, the legal and factual questions raised by Mr. Burke. Copies of the two memoranda are enclosed.

3. Without entering into a detailed discussion, I wish to state that I am in general agreement with the views set forth in the enclosed memoranda. It seems to me that there are only two vital issues involved in this

matter. First, is the compact as drawn detrimental to any vested interests of the United States as represented by the Bureau of Reclamation? Second, will the compact be detrimental to future development by the Bureau in the Republican River Basin? The answer to the first question obviously is "no", because the Bureau has no existing projects in this basin. The answer to the second question is likewise "no" because there are practically no Government lands in this basin, and if any projects are constructed in the future under the Reclamation or Wheeler-Case Acts, appropriations of water for such projects will have to be made in conformity with state laws primarily for the use and benefit of the owners of the lands to be irrigated.

4. In view of these conditions, and the limited interest of the United States in the Republican River Basin, I do not agree with Mr. Burke's contention that the compact should be rejected because the United States was not represented on the commission. If existing Government projects or large acreages of Government lands were located in the Republican River Basin, there would be some justification for Mr. Burke's position.

5. From a policy standpoint I feel that any attempt by the Bureau to resist the approval of this compact would be most unwise and would result in serious repercussions which would be detrimental to harmonious relations between the Bureau and the interested states.

S.O. Harper

Encls.

In dupl.

CC-D.C., Billings,Mont.
(with copies of two memoranda)

[Enclosures omitted; excerpts of Engineer Riter's memorandum are included in Appendix F, *supra*]

APPENDIX H

UNITED STATES

DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION
McCook, Nebraska
May 31, 1941

From Associate Engineer C.T. Judah

To Hydraulic Engineer

Subject: Water Facilities Meetings held in Republican River Basin

1. Reference is made to the Chief Engineer's letter of March 12, 1941; subject, Meeting with Water Facilities Administration in the Republican River Basin.

2. The Bureau of Reclamation was represented at most meetings by Associate Engineer C.T. Judah, or where conflicting meetings were held, by Junior Engineer Morris Broskin.

3. The planning agency for Water Facilities is required to work out development plans with the Land Use Committees in each county. County Land Use Committees were organized by the U.S. Department of Agriculture to plan and coordinate activities of the Department of Agriculture. The County Agent acts as secretary for the committee.

4. The meetings were held by the B. A. E. primarily to acquaint the Land Use Planning Committees with the proposed development plan, and to secure their approval or incorporate further recommendations by them in the report.

5. In general, meetings were poorly attended, due principally to excellent spring farming weather.

6. At each meeting the B. A. E. representative would outline their proposed development plan, after which the Bureau of Reclamation representative would outline the general program in the basin and particularly in the local area. Considerable interest was shown in each type of development. However, no conclusions could be drawn as to which type of development local interests preferred.

7 Overlapping interests of both agencies were pointed out to local interests and fundamental differences in types of developments were explained. A special effort was made to impress on local people that water supplies for both ground water pumping and for gravity stream diversions were from the same source and that new developments supplied by either source would be limited to the amount of water allocated to each state under the proposed compact.

In dupl.

CC-Commissioner
(6-23-41)

APPENDIX I

H.R. 5945

SEVENTY-SEVENTH CONGRESS OF THE UNITED STATES OF AMERICA; AT THE SECOND SESSION; BEGUN AND HELD AT THE CITY OF WASHINGTON ON MONDAY, THE FIFTH DAY OF JANUARY, ONE THOUSAND NINE HUNDRED AND FORTY-TWO

AN ACT

Granting the consent of Congress to a compact entered into by the States of Colorado, Kansas, and Nebraska with respect to the use of the waters of the Republican River Basin.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the entry by the States of Colorado, Kansas, and Nebraska into a compact with respect to the use of the waters of the Republican River Basin, which reads as follows:

REPUBLICAN RIVER COMPACT

The States of Colorado, Kansas and Nebraska hereinafter designated as Colorado, Kansas and Nebraska, respectively, desiring to remove any and all causes, present or future, which might lead to controversies with respect to use of the waters of the Republican River Basin, and being actuated by considerations of interstate comity, and by a desire to effectuate an equitable division of the waters of the Republican River Basin and the

efficient beneficial consumptive uses thereof, and in consideration of the mutual advantages resulting therefrom within their respective boundaries, and pursuant to Acts of their respective Legislatures, have resolved to conclude a compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective commissioners for the negotiating of such a compact:

M.C. Hinderlider, for the State of Colorado

George S. Knapp, for the State of Kansas, and

Wardner G. Scott, for the State of Nebraska,

who have agreed upon the following Articles, to-wit:

Article I.

The Republican River Basin, hereinafter referred to as the "Basin", is herein designated to mean all the area in the States of Colorado, Kansas and Nebraska, which is naturally drained by the Republican River and all of its tributaries to its junction with the Smoky Hill River in Kansas, a map of which signed by the commissioners hereinabove named, is attached hereto and by reference made a part thereof.

The Republican River and tributaries thereof within the Basin, as hereinabove defined, are not navigable, and all uses of water of a consumptive nature, as hereinafter defined, wherever such uses may occur within the Basin, shall constitute paramount uses.

ARTICLE II.

The term "Virgin Water Supply", as herein used, is defined to be the water supply within the Basin undepleted by the activities of man.

The term "Beneficial Consumptive Use" is herein defined to be that use by which the natural water supply of a drainage basin is consumed by the activities of man, and shall include water consumed by evaporation from reservoirs, canals, ditches and irrigated areas.

Beneficial consumptive use shall be the basis and measure of the right to divert and use the natural waters of the Basin, by the citizens, agencies, associations and corporations of the signatory states, and upon this principle the following allocations of water herein made are predicated.

ARTICLE III.

There is hereby allocated to Colorado for use annually a total of fifty-four thousand one hundred (54,100) acre feet of water. This total is to be derived from the sources and in the amounts hereinafter described, and is subject to such quantities being physically available from those sources:

North Fork of the Republican River drainage basin, 10,000 acre feet;

Arikaree River drainage basin, 15,400 acre feet;

South Fork of the Republican River drainage basin, 25,400 acre feet;

Beaver Creek drainage basin, 3,300 acre feet:

In addition thereto there is hereby allocated to Colorado for use annually the entire water supply of the Frenchman and Red Willow Creek drainage basins in Colorado.

There is hereby allocated to Kansas for use annually a total of one hundred ninety thousand three hundred (190,300) acre feet of water. This total is to be derived from the sources and in the amounts hereinafter described and is subject to such quantities being physically available from those sources:

Arikaree River drainage basin, 1000 acre feet;

South Fork of the Republican River drainage basin, 23,000 acre feet;

Driftwood Creek drainage basin, 500 acre feet;

Beaver Creek drainage basin, 6400 acre feet;

Sappa Creek drainage basin, 8800 acre feet;

Prairie Dog Creek drainage basin, 12,600 acre feet;

The main stem of the Republican River at the Nebraska-Kansas state line, 138,000 acre feet; provided that Kansas shall have the right to divert all or any portion thereof at or near the Town of Guide Rock, Nebraska;

And in addition thereto there is hereby allocated to Kansas for use annually the entire water supply originating in the Basin below the Nebraska-Kansas state line.

There is hereby allocated to Nebraska for use annually a total of two hundred thirty-four thousand five hundred (234,500) acre feet of water. This total is to be

derived from the sources and in the amounts hereinafter described and is subject to such quantities being physically available from those sources:

North Fork of the Republican River drainage basin in Colorado, 11,000 acre feet;

Frenchman River drainage basin in Nebraska, 52,800 acre feet;

Rock Creek drainage basin, 4400 acre feet;

Arikaree River drainage basin, 3300 acre feet;

Buffalo Creek drainage basin, 2600 acre feet;

South Fork of the Republican River drainage basin, 800 acre feet;

Driftwood Creek drainage basin, 1200 acre feet;

Red Willow Creek drainage basin in Nebraska, 4200 acre feet;

Medicine Creek drainage basin, 4600 acre feet;

Beaver Creek drainage basin, 6700 acre feet;

Sappa Creek drainage basin, 8800 acre feet;

Prairie Dog Creek drainage basin, 2100 acre feet;

The North Fork of the Republican River in Nebraska and the main stem of the Republican River between the Colorado-Nebraska state line and the Nebraska-Kansas state line, and from the small tributaries thereof, 132,000 acre feet.

The use of the waters hereinabove allocated shall be subject to the laws of the state to which the allocations

are made. No state shall have the right to dictate the method of distribution or place of use of the waters herein allocated to another state.

ARTICLE IV.

The specific allocations in acre feet made to each signatory state by Article III are derived from the computed average annual virgin water supply originating in the following designated drainage basins in the amounts shown:

North Fork of the Republican River drainage basin in Colorado, 44,700 acre feet;

Arikaree River drainage basin, 19,610 acre feet;

Buffalo Creek drainage basin, 7,890 acre feet;

Rock Creek drainage basin, 11,000 acre feet;

South Fork of the Republican River drainage basin, 57,200 acre feet;

Frenchman River drainage basin, 98,500 acre feet;

Blackwood Creek drainage basin, 6,800 acre feet;

Driftwood Creek drainage basin, 7,300 acre feet;

Red Willow Creek drainage basin, 21,900 acre feet;

Medicine Creek drainage basin, 50,800 acre feet;

Beaver Creek drainage basin, 16,500 acre feet;

Sappa Creek drainage basin, 21,400 acre feet;

Prairie Dog Creek drainage basin, 27,600 acre feet;

The North Fork of the Republican River in Nebraska and the main stem of the Republican River between the Colorado-Nebraska state line and the Nebraska-Kansas state line and the small tributaries thereof 87,700 acre feet.

Should the future computed virgin water supply of any source vary more than ten (10) per cent from the virgin water supply as hereinabove set forth, the allocations herein made from such source shall be increased or decreased in the relative proportions that the future computed virgin water supply of such source bears to the computed virgin water supply used herein.

ARTICLE V.

The judgment and all provisions thereof in the case of Adelbert A. Weiland, as State Engineer of the State of Colorado, et al, v. The Pioneer Irrigation Company, decided June 5, 1922, and reported in 259 U.S. 498, affecting the Pioneer Irrigation ditch or canal, are hereby recognized as binding upon the signatory states hereto and the people of each said states, and Colorado, through its duly authorized officials, shall have the perpetual and exclusive right to control and regulate diversions of water at all times by said canal in conformity with said judgment.

The water decrees heretofore adjudicated to said Pioneer Canal by the District Court of Colorado in the amount of fifty (50) cubic feet per second of time is included in and is a part of the total amounts of water hereinbefore allocated to the States of Colorado and Nebraska.

ARTICLE VI.

A lower signatory state, its citizens, agencies, associations and corporations, shall have the right to construct or participate in the future construction and use of any storage reservoir or diversion works in an upper state for the purpose of regulating water herein allocated to such lower state, provided that such right is subject to the rights of the upper state, its citizens, agencies, associations and corporations, to control, regulate and use the waters herein allocated to it.

ARTICLE VII.

A lower signatory state, its citizens, agencies, associations and corporations, shall have the right to acquire in an upper state by purchase, or through exercise of the power of eminent domain, such easements and rights of way, for the construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI; provided, however, the grantees of such rights shall pay to the governmental agencies in which such works are located, each and every year during which such rights of way are occupied for such purposes, a sum of money equivalent to the average annual amount of taxes assessed against the lands and improvements so occupied, based upon the ten years preceding the use of such lands, in reimbursement for the loss of taxes to said governmental agencies.

ARTICLE VIII.

Should any facilities be constructed in an upper state under the provisions of Article VI, such construction and the operation of such facilities shall be subject to the laws of such upper state.

Any repairs to or replacements of such facilities shall also be made in accordance with the laws of such upper state.

ARTICLE IX.

It shall be the duty of the three signatory states to administer this compact through the official in each state who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact.

ARTICLE X.

The physical and other conditions peculiar to the Republican River Basin constitute the basis for this compact, and none of the signatory states hereby concedes that this compact establishes any general principle or precedent with respect to any other interstate stream.

ARTICLE XI.

This compact shall become operative when ratified by the Legislatures of each of the signatory states and consented to by the Congress of the United States. Notice

of ratification by the Legislature of a state shall be given by the Governor of such state to the Governors of the other states, and the President of the United States is requested to give notice to the Governors of the signatory states of consent by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the signatory states.

Done in the City of Denver, in the State of Colorado, on the nineteenth day of March, in the year of our Lord, one thousand nine hundred and forty-one.

M.C. HINDERLIDER
Commissioner for Colorado

GEORGE S. KNAPP
Commissioner for Kansas

WARDNER G. SCOTT
Commissioner for Nebraska

SEC. 2 The right to alter, amend, or repeal this Act is hereby expressly reserved.

SAM RAYBURN,
Speaker of the House of Representatives.

H. A. WALLACE,
Vice President of the United States and President of the Senate.

[Endorsement on back of bill:]

I certify that this Act originated in the House of Representatives.

SOUTH TRIMBLE, *Clerk.*

APPENDIX J

77th Congress
2d Session

House Doc.
No. 690

COMPACT WITH RESPECT TO THE USE OF WATERS OF THE REPUBLICAN RIVER BASIN

MESSAGE
FROM
THE PRESIDENT OF THE UNITED STATES
RETURNING

WITHOUT APPROVAL THE BILL (H.R. 5945) GRANTING THE CONSENT OF CONGRESS TO COMPACT ENTERED INTO BY THE STATES OF COLORADO, KANSAS, AND NEBRASKA WITH RESPECT TO THE USE OF THE WATERS OF THE REPUBLICAN RIVER BASIN

APRIL 2, 1942 – Ordered to be printed
as a House Document

To the House of Representatives.

I return herewith, without my approval, H.R. 5945, a bill granting the consent of Congress to a compact entered into by the States of Colorado, Kansas, and Nebraska with respect to the use of the waters of the Republican River Basin.

The compact was negotiated by the three States with a view to apportioning the waters of the Republican Basin for irrigation and related uses. I approve of this purpose and of an interstate compact as a means of making the necessary apportionment. In this basin, as in

other parts of the arid and semiarid West, the effective use of water and the control of destructive floods demand joint action by the States working in harmonious relation with the Federal agencies concerned.

It is unfortunate that the compact also seeks to withdraw the jurisdiction of the United States over the waters of the Republican Basin for purposes of navigation and that it appears to restrict the authority of the United States to construct irrigation works and to appropriate water for irrigation purposes in the basin. The provisions having that effect, if approved without qualification, would impede the full development of the water resources of the basin and would unduly limit the exercise of the established national interest in such development.

While I find it necessary to withhold my approval of the legislation in its present form, I would be glad to approve a bill which, in assenting to the compact, specifically reserves to the United States all of the rights and responsibilities which it now has in the use and control of the waters of the basin.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE, *April 2, 1942.*

[Recitation of H.R. 5945 omitted]

APPENDIX K

78th CONGRESS
1st SESSION

S. 649

IN THE HOUSE OF REPRESENTATIVES

APRIL 20, 1943

Referred to the Committee on
Immigration and Naturalization

AN ACT

To grant the consent of Congress to a compact entered into by the States of Colorado, Kansas, and Nebraska relating to the waters of the Republican River Basin, to make provisions concerning the exercise of Federal jurisdiction as to those waters, to promote flood control in the Basin, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the compact authorized by the Act entitled "An Act granting the consent of Congress to the States of Colorado, Kansas, and Nebraska to negotiate and enter into a compact for the division of the waters of the Republican River", approved August 4, 1942 (Public Law 696, Seventy-seventh Congress; 56 Stat. 736), signed by the commissioners for the States of Colorado, Kansas, and Nebraska at Lincoln, Nebraska, on December 31, 1942, and thereafter ratified

by the Legislatures of the States of Colorado, Kansas, and Nebraska, which compact reads as follows:

"REPUBLICAN RIVER COMPACT

"The States of Colorado, Kansas, and Nebraska, parties signatory to this compact (hereinafter referred to as Colorado, Kansas, and Nebraska, respectively, or individually as a State, or collectively as the States), having resolved to include a compact with respect to the waters of the Republican River Basin, and being duly authorized therefor by the Act of the Congress of the United States of America, approved August 4, 1942, (Public No. 696, 77th Congress, Chapter 545, 2nd Session) and pursuant to Acts of their respective Legislatures have, through their respective Governors, appointed as their Commissioners:

M.C. Hinderlider, for Colorado
George S. Knapp, for Kansas
Wardner G. Scott, for Nebraska

who, after negotiations participated in by Glenn L. Parker, appointed by the President as the Representative of the United States of America, have agreed on the following articles:

"ARTICLE I

"The major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the 'Basin') for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate

comity; to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods.

"The physical and other conditions peculiar to the Basin constitutes the basis for this compact, and none of the States hereby, nor the Congress of the United States by its consent, concedes that this compact establishes any general principle or precedent with respect to any other interstate stream.

"ARTICLE II

"The Basin is all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River, and its tributaries, to its junction with the Smoky Hill River in Kansas. The main stem of the Republican River extends from the junction near Haigler, Nebraska, of its North Fork and the Arikaree River, to its junction with Smoky Hill River near Junction City, Kansas, Frenchman Creek (River) in Nebraska is a continuation of Frenchman Creek (River) in Colorado. Red Willow Creek in Colorado is not identical with the stream having the same name in Nebraska. A map of the Basin approved by the Commissioners is attached and made a part hereof.

"The term 'Acre-foot', as herein used, is the quantity of water required to cover an acre to the depth of one foot and is equivalent to forty-three thousand, five hundred sixty (43,560) cubic feet.

"The term 'Virgin Water Supply', as herein used, is defined to be the water supply within the Basin undepleted by the activities of man.

"The term 'Beneficial Consumptive Use' is herein defined to be that use by which the water supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area.

"Beneficial consumptive use is the basis and principle upon which the allocations of water hereinafter made are predicated.

"ARTICLE III

"The specific allocations in acre-feet hereinafter made to each State are derived from the computed average annual virgin water supply originating in the following designated drainage basins, or parts thereof, in the amounts shown:

"North Fork of the Republican River drainage basin in Colorado, 44,700 acre-feet;

"Arikaree River drainage basin, 19,610 acre-feet;

"Buffalo Creek drainage basin, 7,890 acre-feet;

"Rock Creek drainage basin, 11,000 acre-feet;

"South Fork of the Republican River drainage basin, 57,200 acre-feet;

Frenchman Creek (River) drainage basin in Nebraska, 98,500 acre-feet;

"Blackwood Creek drainage basin, 6,800 acre-feet;

"Driftwood Creek drainage basin, 7,300 acre-feet;

"Red Willow Creek drainage basin in Nebraska, 21,900 acre-feet;

"Medicine Creek drainage basin, 50,800 acre-feet;

"Beaver Creek drainage basin, 16,500 acre-feet;

"Sappa Creek drainage basin, 21,400 acre-feet;

"Prairie Dog Creek drainage basin, 27,600 acre-feet;

"The North Fork of the Republican River in Nebraska and the main stem of the Republican River between the junction of the North Fork and the Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line and the small tributaries thereof, 87,700 acre-feet.

"Should the future computed virgin water supply of any source vary more than ten (10) per cent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased in the relative proportion that the future computed virgin water supply of such source bears to the computed virgin water supply used herein.

"ARTICLE IV

"There is hereby allocated for beneficial consumptive use in Colorado, annually, a total of fifty-four thousand, one hundred (54,100) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"North Fork of the Republican River drainage basin, 10,000 acre-feet;

"Arikaree River drainage basin, 15,400 acre-feet;

"South Fork of the Republican River drainage basin, 25,400 acre-feet;

"Beaver Creek drainage basin, 3,300 acre-feet; and

"In addition, for beneficial consumptive use in Colorado, annually, the entire water supply of the Frenchman Creek (River) drainage basin in Colorado and of the Red Willow Creek drainage basin in Colorado.

"There is hereby allocated for beneficial consumptive use in Kansas, annually, a total of one hundred ninety thousand, three hundred (190,300) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"Arikaree River drainage basin, 1,000 acre-feet;

"South Fork of the Republican River drainage basin, 23,000 acre-feet;

"Driftwood Creek drainage basin, 500 acre-feet;

"Beaver Creek drainage basin, 6,400 acre-feet;

"Sappa Creek drainage basin, 8,800 acre-feet;

"Prairie Dog Creek drainage basin, 12,600 acre-feet;

"From the main stem of the Republican River upstream from the lowest crossing of the river at the Nebraska-Kansas state line and from water supplies of upstream basins otherwise unallocated herein, 138,000

acre-feet; provided, that Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska; and

"In addition there is hereby allocated for beneficial consumptive use in Kansas, annually, the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line.

"There is hereby allocated for beneficial consumptive use in Nebraska, annually, a total of two hundred thirty-four thousand, five hundred (234,500) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"North Fork of the Republican River drainage basin in Colorado, 11,000 acre-feet;

"Frenchman Creek (River) drainage basin in Nebraska, 52,800 acre-feet;

"Rock Creek drainage basin, 4,400 acre-feet;

"Arikaree River drainage basin, 3,300 acre-feet;

"Buffalo Creek drainage basin, 2,600 acre-feet;

"South Fork of the Republican River drainage basin, 800 acre-feet;

"Driftwood Creek drainage basin, 1,200 acre-feet;

"Red Willow Creek drainage basin in Nebraska, 4,200 acre-feet;

"Medicine Creek drainage basin, 4,600 acre-feet;

"Beaver Creek drainage basin, 6,700 acre-feet;

"Sappa Creek drainage basin, 8,800 acre-feet;

"Prairie Dog Creek drainage basin, 2,100 acre-feet;

"From the North Fork of the Republican River in Nebraska, the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line, from the small tributaries thereof, and from water supplies of upstream basins otherwise unallocated herein, 132,000 acre-feet.

"The use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made.

"ARTICLE V

"The judgment and all provisions thereof in the case of Adelbert A. Weiland, as State Engineer of Colorado, et al, v. The Pioneer Irrigation Company, decided June 5, 1922, and reported in 259 U.S. 498, affecting the Pioneer Irrigation ditch or canal, are hereby recognized as binding upon the States; and Colorado, through its duly authorized officials, shall have the perpetual and exclusive right to control and regulate diversions of water at all times by said canal in conformity with said judgment.

"The water heretofore adjudicated to said Pioneer Canal by the District Court of Colorado, in the amount of fifty (50) cubic feet per second of time is included in and is a part of the total amounts of water hereinbefore allocated for beneficial consumptive use in Colorado and Nebraska.

"ARTICLE VI

"The right of any person, entity, or lower State to construct, or participate in the future construction and use of any storage reservoir or diversion works in an upper State for the purpose of regulating water herein allocated for beneficial consumptive use in such lower State, shall never be denied by an upper State; provided, that such right is subject to the rights of the upper State.

"ARTICLE VII

"Any person, entity, or lower State shall have the right to acquire necessary property rights in an upper State by purchase, or through the exercise of the power of eminent domain, for the construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI; provided, however, that the grantees of such rights shall pay to the political subdivision of the State in which such works are located, each and every year during which such rights are enjoyed for such purposes, a sum of money equivalent to the average annual amount of taxes assessed against the lands and improvements during the ten years preceding the use of such lands, in reimbursement for the loss of taxes to said political subdivisions of the State.

"ARTICLE VIII

"Should any facility be constructed in an upper State under the provisions of Article VI, such construction and

the operation of such facility shall be subject to the laws of such upper State.

"Any repairs to or replacements of such facility shall also be made in accordance with the laws of such upper State.

"ARTICLE IX

"It shall be the duty of the three States to administer this compact through the official in each State who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

"The United States Geological Survey, or whatever federal agency may succeed to the functions and duties of that agency, in so far as this compact is concerned, shall collaborate with the officials of the States charged with the administration of this compact in the execution of the duty of such officials in the collection, correlation, and publication of water facts necessary for the proper administration of this compact.

"ARTICLE X

"Nothing in this compact shall be deemed:

"(a) To impair or affect any rights, powers or jurisdiction of the United States, or those acting by or under its authority, in, over, and to the waters of the Basin; nor to impair or affect the capacity of the United States, or those

acting by or under its authority, to acquire rights in and to the use of the waters of the Basin;

"(b) To subject any property of the United States, its agencies or instrumentalities, to taxation by any State, or subdivision thereof, nor to create an obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, state agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

"(c) To subject any property of the United States, its agencies or instrumentalities, to the laws of any State to any extent other than the extent these laws would apply without regard to this compact.

"ARTICLE XI

"This compact shall become operative when ratified by the Legislature of each of the States, and when consented to by the Congress of the United States by legislation providing, among other things, that:

"(a) Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by this compact, shall be made within the allocations hereinabove made for use in that State and shall be taken into account in determining the extent of use within that State.

"(b) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and

to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

"(c) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by this compact which may be impaired by the exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with this compact at the time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the federal program or project which causes such impairment.

"IN WITNESS WHEREOF, the Commissioners have signed this compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the States.

"Done in the City of Lincoln, in the State of Nebraska, on the 31st day of December, in the year of our Lord, one thousand nine hundred forty-two.

"M. C. HINDERLIDER

"Commissioner for Colorado

"GEORGE S. KNAPP

"Commissioner for Kansas

"WARDNER G. SCOTT

"Commissioner for Nebraska

"I have participated in the negotiations leading to this proposed compact and propose to report to the Congress of the United States favorably thereon.

"GLENN L. PARKER
"Representative of the United States"

SEC. 2. (a) In order that the conditions stated in article XI of the compact hereby consented to shall be met and that the compact shall be and continue to be operative, the following provisions are enacted –

(1) any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by such compact, shall be made within the allocations made by such compact for use in that State and shall be taken into account in determining the extent of use with the State;

(2) the United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for

multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of such compact and after consultation with all interested Federal agencies and the State officials charged with the administration of such compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

(3) the United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by such compact which may be impaired by the exercise of Federal jurisdiction in, over, and to such waters: *Provided*, That such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with such compact at the time of the impairment thereof, and was validly initiated under State law prior to the initiation or authorization of the Federal program or project which uses such impairment.

(b) As used in this section –

(1) "beneficial consumptive uses" has the same meaning as when used in the compact consented to by Congress by this Act; and

(2) "Basin" refers to the Republican River Basin as shown on the map attached to and made a part of the original of such compact deposited in the archives of the Department of State.

Passed the Senate April 19 (legislative day, April 16), 1943.

Attest: EDWIN A. HALSEY,

Secretary.

APPENDIX L

[Letterhead partially omitted]

STATE OF COLORADO
ENGINEERING DEPARTMENT
DENVER

January 9, 1943

SUBJECT:

Honorable Ralph L. Carr
Governor of Colorado
State Capitol Building
Denver, Colorado

My dear Governor Carr:

I have the honor to transmit herewith, for your consideration and further disposition, an original draft of a compact apportioning the waters of the Republican River Basin between the States of Colorado, Kansas and Nebraska, which was consummated at Lincoln, Nebraska, on December 31, 1942, by the Commissioners appointed by the Governors of the signatory States, pursuant to authority from the Legislatures of these States to negotiate an Interstate Compact to equitably apportion the waters of the Republican River Basin.

This Compact replaces the Compact which was ratified by the Legislatures of Colorado, Kansas and Nebraska, in 1941, and which, by appropriate Act, received the approval of the Congress of the United States, but which Act was vetoed by the President for the reason that he felt the Compact did not adequately recognize and protect the interests of the United States.

The Compact herewith transmitted, was negotiated pursuant to not only the aforementioned authority of the Legislatures and Governors of the signatory States, but also to Pub. 696-77th Congress, Chapter 545, 2nd Session (Senate 2604) granting authority to the States to enter into a Compact, which Act also provided for the appointment by the President of a representative of the United States to participate in said negotiations, and to make report to the Congress of the proceedings, and of any compact entered into.

Pursuant to this authorization by Congress the President designated Mr. Glen L. Parker, Chief Hydraulic Engineer of the United States Geological Survey, as the Federal representative, who, later by unanimous action of the three State Commissioners, was made Chairman of the Republican River Compact Commission.

The Commission held two meetings, one at Denver, Colorado, on December 2nd and 3rd, and one at Lincoln, Nebraska on December 29, 30, 31, 1942, at the conclusion of which this Compact was signed.

These two meetings of the Commission, presided over by the Federal representative, were participated in by Honorable Gail L. Ireland, Attorney General of Colorado, and Clifford H. Stone, Director of the Colorado Water Conservation Board; by representatives of the Attorneys General of Kansas and Nebraska, and also by representatives of the U.S. Departments of Agriculture, Interior and War. Also present was a representative of the National Resources Planning Board.

The draft of the Compact, herewith transmitted, does not in any way change the allocations of water to the

signatory States provided for in the former Compact. The only material changes in the new draft are of a legal nature, and were made in an attempt to compose conflicts between the fundamental rights and powers of the Federal Government arising out of the navigation clause of the Constitution of the United States as interpreted by decisions of the United States Supreme Court, and the rights and vital interests of the signatory States in the consumptive use of the waters of the Republican River and its tributaries essential to the full development of the Basin.

It is believed that the Compact as signed equitably apportions between the signatory States the waters of the Basin for beneficial multiple use purposes, recognizes and protects existing uses of waters therein, and recognizes that the most efficient utilization of the waters within the Basin is for beneficial consumptive purposes.

It is believed that this Compact, when operative, will promote the orderly development of the land and water resources of the Basin, including the regulations of destructive floods, and will protect any agency of the Federal Government in the acquirement of water rights under the laws of the signatory States, and also the authority of the Federal Government to regulate the waters of the Basin in the interest of navigation, should such need arise in the future.

The compact allocates for beneficial consumptive use in Colorado, annually, a total of 54,100 acre feet of water from the following sources and in the following amounts:

From the North Fork of the Republican River Drainage Basin, 10,000 acre feet.

From Arickaree River Drainage Basin, 15,400 acre feet

From the South Fork of the Republican River Drainage Basin, 25,400 acre feet.

From Beaver Creek Drainage Basin, 3,300 acre feet, and, in addition, the entire water supply of the drainage basins of Frenchman and Red Willow Creeks in Colorado.

This allocation constitutes about 23 percent of the entire average annual water supply of the North Fork of the Republican River; 80 percent of that of the Arickaree River, 77 percent of that of the South Fork of the Republican River, and an estimated 100 percent of the waters of Beaver Creek Basin in Colorado, which it is believed is the limit of ultimate consumptive use which it is possible to make in Colorado of the waters of these stream basins.

These allocations include not only surface, but also sub-surface, or underground water supplies.

It should be borne in mind that these allocations of waters are for beneficial consumptive use, and do not limit the right of Colorado or any of its people or entities to divert and apply much greater quantities of water than the amounts allocated by the Compact.

It will be noted that Article XI of the Compact includes the specific language to be used by the Congress in giving its consent to and approval of the actions of the signatory States, which constitutes a definite recognition on the part of the Congress, of the paramount importance of the use of the waters of the Basin in the development of multiple purpose projects which will involve the consumptive use of the waters therein, and also constitutes a

recognition on the part of the Congress of any established use for domestic and irrigation purposes of the waters allocated by the Compact when such use is a valid one under the laws of the appropriate State.

A more detailed report will be presented later for the information of the Legislature.

In conclusion, I desire to express to you my deep sense of appreciation for the confidence reposed in me as the official representative of our State to carry out these important negotiations, and for the invaluable assistance from you, as Governor, and from Attorney General Ireland and Judge Clifford H. Stone.

Respectfully submitted,

/s/ M. C. Hinderlider
Republican River Compact
Commissioner for Colorado

MCH J

APPENDIX M

[Titles condensed; recitation of the Compact omitted]

Explanatory Statement and Report
to the
Thirty-fourth General Assembly
by
M.C. Hinderlider,
Republican River Compact Commissioner
for Colorado

There is herewith submitted to the General Assembly of the State of Colorado, with recommendation for favorable consideration, a new Republican River Compact. After two conferences by the Republican River Compact Commissioners and their legal advisers, this Compact was signed by the Commissioners for the States of Colorado, Kansas and Nebraska, at Lincoln, Nebraska, on the 31st day of December, 1942. The major purposes of this Compact are set forth in Article I which reads, in part, as follows:

> "The major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the "Basin") for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods."

The negotiation of this Compact by the States of Colorado, Kansas and Nebraska was authorized by an Act of the Congress of the United States, approved August 4, 1942 (Public No. 696 – 77th Congress, Chapter 545 – 2nd Session) which authorized these states "to

negotiate and enter into a compact not later than June 1, 1945, providing for an equitable division and apportionment among the said states of the waters of the Republican and also of its tributaries above its junction with the Smoky Hill River in Kansas, upon condition that a suitable person, who shall be appointed by the President of the United States, shall participate in said negotiations as the representative of the United States and shall make report to the Congress of the proceedings and of any compact entered into * * * "

Thereafter and pursuant to their several authorities, the Governors of each of the signatory States named the same Commissioners who had been designated to negotiate a former Compact, and the President appointed as the representative of the United States, Glenn L. Parker, Chief Hydraulic Engineer of the United States Geological Survey.

The Commission held its first meeting in Denver, Colorado, on December 2-3, 1942, when, by unanimous action of the Commission, Mr. Parker was designated Chairman thereof. Another, and the final meeting was held in Lincoln, Nebraska, on December 29, 30, 31, 1942, following which this Compact was signed by the Commissioners and the Federal representative endorsed upon the Compact the following:

> "I have participated in the negotiations leading to this proposed compact and propose to report to the Congress of the United States favorably thereon.
>
> GLENN L. PARKER,
> Representative of the
> United States."

Throughout these two conferences the Commissioner for Colorado was advised on all matters by Attorney General Gail L. Ireland and Judge Clifford H. Stone, Director of the Colorado Water Conservation Board, whose services in this connection were most valuable. During the negotiations the Commissioners for Kansas and Nebraska were advised by representatives of the Attorneys General of those two states. Prior to the attachment of the signatures of the Commissioners to this Compact, the Governors of each of the signatory states were fully advised of the conclusions reached by the Commissioners, and approved the same.

The Legislatures of Colorado, Kansas and Nebraska, in 1941, ratified a former Compact allocating the waters of the Republican river basin. That Compact was later approved by the Congress of the United States. The Act providing for Congressional approval, however, was vetoed by the President. The veto message of the President set forth, in substance, that the Compact failed to adequately protect the interests of the United States. This situation arose out of the inclusion in Article I of the former Compact the following language:

> "The Republican River and tributaries thereof within the basin, as hereinabove defined, are not navigable, and all uses of water of a consumptive nature, as hereinafter defined, wherever such uses may occur within the basin, shall constitute paramount uses."

The Federal Power Commission with support, in varying degree, from other Federal agencies, strenuously opposed within the Congress, the last mentioned provision.

Numerous amendments to the approving legislation were proposed in Congress. The adoption of these amendments, however, would have constituted material modifications of that Compact, and would have required a re-reference of the Compact to the Legislatures of the signatory states. They were finally defeated, and Congress approved the former Compact without modifying provisions, but, as stated, the approving legislation was vetoed by the President.

In general, it should be stated that representatives of certain Federal agencies contended that the provisions of Article I of the first Compact, above quoted, created a dangerous precedent, and were contrary to federal jurisdiction and to the public interest, unless interpreted, limited and modified by appropriate amendments to be incorporated in the approving legislation.

Following the abortive effort to obtain final approval of the former Compact by the Congress, it was believed by the Commissioners that the uses of the waters of the Republican River and its tributaries and the inherent Federal and States' interests could be correlated in such way as to permit of the most beneficial use of the waters of the Basin.

Congressional authorization to make a new Compact having been obtained, further negotiations followed, as above outlined.

During these negotiations for a new Compact, representatives of the Departments of Agriculture and Interior, the Corps of U.S. Engineers and the National Resources Planning Board, were in attendance and contributed materially in the negotiations of the Commissioners.

This Compact eliminates the objectionable provision in the former Compact, hereinabove quoted.

Article XI of this Compact, however, is designed to protect the States' interests in these waters by a recognition that the most efficient utilization of the waters within the Basin is for beneficial consumptive use, and also to promote joint action by the States and the Federal Government in effectuating such use and for the control of destructive floods.

It will be noted that this Compact provides that, unless the Congress of the United States in its approving legislation includes the provisions set forth in Article XI for the protection of the interests of the States, then the approval would be ineffectual. These protective measures may be summarized as follows:

1. Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by this Compact, shall be made within the allocations of water for use within such State.

2. That the United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin, shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that the beneficial consumptive use of the waters within the Basin, is of paramount importance to the development of the Basin.

3. That no exercise of Federal jurisdiction over such waters, that would interfere with the full beneficial consumptive use of the water within the Basin, shall be made except upon a determination, giving due consideration to the objectives of this Compact and after consultation with all interested Federal agencies and State officials charged with the administration of this Compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

4. That the United States or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by this Compact which may be impaired by the exercise of Federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with this Compact at the time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the Federal program or project which causes such impairment.

In considering this Compact it should be noted that beneficial consumptive use is the basis and the principle upon which the allocations of water are made and predicated. Beneficial consumptive use is defined by the Compact in these words:

> "The term 'Beneficial Consumptive Use' is herein defined to be that use by which the water supply of the Basin is consumed thru the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area."

This definition of "Beneficial Consumptive Use" must be considered in connection with Article XI of the Compact. "Beneficial Consumptive Use", as above defined, includes the use of water for domestic, irrigation and industrial purposes. The use of water for these purposes is regulated and controlled under State laws.

The Federal Government claims jurisdiction over the waters of the Basin for the production of hydro-electric energy, the maintenance of navigable capacity within and without the Basin, and in the interest of flood control, all of which in general, are of a non-consumptive character.

It is believed that the interests of the Federal Government and of the signatory States in the waters of the Basin, are adequately protected and correlated by the provisions of Article X and XI, and by other provisions of this Compact.

In its deliberations resulting in the first draft of a Compact, the commission gave careful consideration to the report of the Corps of U.S. Engineers dated February 27, 1940, covering its comprehensive study in 1939-1940 of the needs for flood control, including presently irrigated and arable areas, water conservation and related benefits to irrigation, domestic requirements, and power development. The Commission conferred from time to time with representatives of the U.S. Bureau of Reclamation which was then engaged in field investigations and studies of water supply, irrigated and arable areas within the Basin, the development of which would require the consumptive use of the waters of the Republican river and its tributaries. During its deliberations the Commission also conferred with representatives of the Bureau of

Agricultural Economics of the U.S. Department of Agriculture which had just completed a field study and voluminous report on the underground water resources of the Basin and the availability of the same for future developments therein. While the absence of extensive development of the natural resources of the Basin tended to simplify the problem of allocating the waters thereof, the Commission was confronted with other difficult problems involving a multiplicity of primary and secondary tributary stream systems which are largely disassociated in their possibilities for use, and which, due to their erratic character, will require the construction of extensive regulatory works throughout the Basin. A careful evaluation by the Commission, of the total available water supplies of the Basin, based upon the preceding eleven years during which period fairly reliable records of stream flow are available, and of the results of the studies by the Corps of U.S. Engineers, U.S. Bureau of Reclamation and Bureau of Agricultural Economics, with respect to irrigated and arable areas, disclosed that the virgin water supplies of the Basin when regulated by storage reservoirs are, in general, ample to meet all present and future requirements for domestic, irrigation and industrial uses within the Basin, with periodic surpluses which, when regulated, could be made to serve navigation needs, if any, outside the Basin.

The Compact allocates for beneficial consumptive use in Colorado, annually, a total of 54,100 acre-feet derived from the following sources:

North Fork of the Republican River... 10,000 acre-feet

Arikaree River... ... . 15,400 acre-feet

South Fork of the Republican River. .. 25,400 acre-feet

Beaver Creek .. ..3,300 acre-feet

and, in addition, the entire water supply of the Frenchman and Red Willow Creek drainage basins in Colorado.

It is specifically pointed out that the above allocations of water are identical with the allocations made by the former Compact heretofore approved by the Legislatures of the signatory states; and that such are in no manner or detail changed by this Compact. In the interest of clarity, however, it was considered desirable, in this Compact, to transpose the order in which the determined basic water supplies of the Basin, and the specific allocations to each of the three States, was set out in the former Compact. The only material changes in this Compact, were made to meet the conflicts between the various uses of water, and between Federal and State interests in these waters. These latter changes, as hereinabove explained, are all of a legal nature.

The foregoing allocations constitute about 23 percent of the total water supply of the North Fork of the Republican; 79 percent of that of the Arikaree; 44 percent of that of the South Fork of the Republican; and 100 per cent of that of the Beaver, Frenchman and Red Willow Creek drainage basins in Colorado. It should be borne in mind that these allocations of water do not limit the right of Colorado or any of its agencies to divert and apply much larger quantities of water than the amounts allocated by the Compact.

Particular attention is called to Article I of this Compact which provides in part as follows:

> "The physical and other conditions peculiar to the Basin constitute the basis for this compact, and none of the States hereby, nor the Congress of the United States by its consent, concedes that this compact establishes any general principle or precedent with respect to any other interstate stream."

It is believed that this Compact equitably apportions the total available average annual virgin water supplies of the Basin, both surface and underground, among the three signatory States, in such manner and in such amounts as will not only protect all existing uses within the Basin, but will insure, insofar as possible, that the available water supplies when regulated by storage works, will adequately meet future requirements for domestic, irrigation, industrial and recreational purposes, and that it affords ample opportunity for multiple use development and for flood control. It provides for the collaboration by the U.S. Geological Survey with the Compact Commissioners of the three States, in the collection, correlation and publication of water facts necessary for the proper administration of the Compact.

It is also believed that this Compact, by its recognition and correlation of the inherent rights of the signatory States and their entities, and those of the Federal Government, provides the sound and constructive basis dictated by the physical and other conditions peculiar to the Basin, as mentioned in Article I of this Compact, for the regulation, control and most beneficial uses of the waters

of the Basin, which uses are of such vital importance to that arid and semi-arid region.

As Commissioner for the State of Colorado, I, therefore, submit this Compact to the 34th General Assembly of the State of Colorado, for its consideration, and recommend the ratification of the same by your Honorable body.

M. C. HINDERLIDER,
Republican River Compact
Commissioner for Colorado

APPENDIX N

[Letterhead partially omitted]

STATE OF COLORADO
ENGINEERING DEPARTMENT
DENVER

February 5, 1943

SUBJECT:

Mr. Glen L. Parker
Chief Hydraulic Engineer
U.S. Geological Survey
North Interior Building
Washington, D.C.

Dear Mr. Parker:

For your information I am enclosing two mimmeograph copies of the Republican River Compact, to which is attached my explanatory statement and report on the Compact to our General Assembly, which I thought you might be interested in reading.

Plans have been made for the publication of the Compact, and my explanatory statement and report, in pamphlet form, similar to that of the Rio Grande Compact, for distribution among those who may be interested in the Compact.

I would be pleased to have your observations, criticisms, etc., on my explanatory article.

I furnished a copy of the same to Mr. Knapp and Mr. Scott. Mr. Scott has just sent me a copy of a Bill introduced in his Legislature for the ratification of the Compact, but as yet I have had no word from Mr. Knapp concerning the progress in his Legislature.

I note from last night's press reports that Senator Burke of Nebraska and Congressman Curtis, have introduced Bills in the Congress for the purpose of obtaining approval by the Congress of the Compact.

I am interested in hearing from you what progress, if any, has been made by you with interested Federal agencies in this connection.

I might state also that I furnished Colonel Pick two copies of the enclosure, and have been advised by both Colonel Pick and Major Freeman that there is no disposition on their parts to place any obstructions in the way of obtaining the consent of the Congress. It is clearly understood, of course, that Colonel Pick is in no way obligated, as you have heretofore advised me.

We are asking the present Legislature to appropriate at least the amount of money appropriated last session for our cooperative stream gaging work, and I hope that you will be successful in obtaining your usual appropriations at least for carrying on this important work.

With best regards, I am

Sincerely yours,

/s/ M. C. Hinderlider
State Engineer

MCH J

encls

[Enclosures omitted]

APPENDIX O

Computation of Virgin Water Supply Republican River Compact Administration

* * *

GENERAL PROCEDURES

Reservoir evaporation shall be the total evaporation corrected for the precipitation upon the reservoir surface area.

Average monthly reservoir surface areas shall be computed by applying the average of the mean daily reservoir elevations to the most recent area-capacity tables.

Depletions of stream flows due to erosion control practices and stockwater ponds have not been included in the present virgin water supply formulas. Representatives of the U. S. Department of Agriculture have indicated there has been no success in isolating the effect of such practices on stream flow.

Irrigation diversions from ground water shall be limited to those by wells pumping from the alluvium along the stream channels. The determination of the effect of pumping by "table-land" wells on the flows of the streams in the Republican River Basin must await considerably more research and data regarding the character of the ground-water aquifers and the behavior of ground-water flow before even approximate information is available as to the monthly or annual effects on stream flows. The ground-water representatives of the Geological Survey and the University of Nebraska reported that the effect of pumping by "table-land" wells is not subject to

an exact determination and that it is possible those wells may not appreciably deplete stream flows. The wells in the Frenchman Creek drainage basin in Colorado have been considered as "table-land" wells.

Irrigation diversions by canals, stream pumps and wells for which recorded diversions are not available shall be computed by applying an average annual diversion rate to the irrigated acreages.

Return flows from the lands irrigated by major project developments flowing into two or more designated drainage basins shall be divided in the ratio of the irrigated lands from which the water returns to each drainage basin.

Return flows are considered to be reflected in stream discharge records during the same year the irrigation diversions are made.